Supreme Court, U.S.
FILED

No. 09-09-659

DEC 3 - 2009

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MATTHEW SPEIGHTS,
Petitioner,

v.

CITY OF OCEANSIDE AND OCEANSIDE CITY COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeals, Fourth Appellate Dist., Div. 1

PETITION FOR A WRIT OF CERTIORARI

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December 3, 2009

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. After receiving lawful building permits and completing construction, is holding an owner's vested property "hostage" and depriving use by refusing to issue certificates of occupancy until that property owner undertakes a no nexus public works project, illegally imposed, after construction is completed a taking requiring just compensation per the 5th Amendment to the U.S Constitution?

2. After government activities have already worked a taking, is there any subsequent action the government can take to relieve it of its duty to provide just compensation?

3. Can the government be allowed to keep the benefit obtained from depriving a person due process of law?

4. Can the government use a fictitious and nonexistent short statute of limitations that exist neither in state or federal law to defeat a 5th Amendment takings claim?

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption:

- Petitioner Matthew Speights was the Plaintiff and Appellant below;
- Respondent The City of Oceanside and Oceanside City Council were the Defendants and Respondents below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to the California Court of Appeals, Fourth Appellate District, Division One.

OPINION AND JUDGMENT BELOW

The California Superior Court, County of San Diego North County's opinion in a minute order dated 10/7/08, case no. GIN057318-1, the Court of Appeals, Forth District, Division One, unreported decision dated 6/18/09, case no. D054122. The California Supreme Court's denial of Petition for Review dated 9/9/09, case no. S174587.

STATEMENT OF JURISDICTION

The California Court of Appeals entered judgment on June 18, 2009, and denied a timely petition for rehearing on July 7, 2009. The California Supreme Court denied review on September 9, 2009.

This Court has jurisdiction pursuit to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Constitution, 5th Amendment:

". . . nor shall private property be taken for public use without just compensation being paid."

U.S. Constitution, 14th Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Portions of the California Subdivision Map Act pertaining to the statute of limitations. Government Code section 66449.37.

STATEMENT OF THE CASE AND REASONS TO GRANT REVIEW

The City of Oceanside, California. bypassed eminent domain proceedings and appropriated my property until I undertook a no nexus public works project and then used a fictitious and nonexistent statute of limitations to defeat a 5th Amendment takings claim.

In good times there are approx 2 million building permits issued annually and in bad times it might be approx. 500,000 building permits issued.[1] How many of these people lose their property because the government decided it wanted their property or because

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[1] http.//www census gov/const/bpsa pdf

the government decides to change the rules after the construction of their building was completed and ready to occupy? I don't know, but I think, by and large the property owners who do get foreclosed on just walk away. Knowing you can't fight city hall. The tremendous expense and the willingness of the local courts to almost blindly back cities no matter what they do.

This Court needs to clarify when a municipality can be allowed to turn the American dream of building a home or owning property into a nightmare by depriving occupancy or revoking lawfully issued permits.

In light of this Court's highly controversial *Kelo v. City of New London*, 545 U.S. 469 (2005) decision,[2] this Court should step forward and tell the American people that the Courts still respect the Constitution and individual property rights and that property cannot be taken by the government without the payment of just compensation.

A. PERTINENT FACTS

I, Matthew Speights was/am from Seattle, Washington and purchased property in Oceanside, California in March of 2000. In 2000 I submitted preliminary plans to the Oceanside Planning Department and on May 7, 2001 the Oceanside Planning Commission (the designated Advisory Agency) issued Conditions of Approval for the development of my property pursuant to the authority granted them under

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[2] "The New London Disaster" stated "as much as a 90% disapproval rating from the public" over the *Kelo* decision Law Professor Gideon Kanner's guest column in the *National Journal*, Sept 1, 2009

California Government Code section 66415 of the Subdivision Map Act

I then had architectural plans and engineering prepared in conformance with the Conditions of Approval, went through the Oceanside permitting process and obtained lawful permits in compliance with Conditions of Approval, land use regulations, ordinances and zoning regulations.

On October 25, 2001 I sent the Oceanside Unified School District (OUSD) a letter stating our verbal agreement that I would be over excavating on their property and would leave their property as I found it

On April 10, 2002 my Grading and Drainage Plan was approved. After commencing construction, on April 30, 2002 my construction crew over excavated on the *upper property owner's* property belonging to the OUSD and uncovered the end of a "watercourse" pipe, belonging to a public school's dilapidated and non-functioning storm water system.

After uncovering the pipe from the public school's dilapidated storm water system on April 30, 2002, water ran downhill and drained onto my property. City staff refused to allow me to rebury the public school's storm water pipe and leave it as I found it

City staff, which has no authority under the California Subdivision Map Act to issue conditions or requirements on this type of development, imposed the requirement of me addressing the public schools' storm water pipe, even though my property had no impact on the public school's storm water system. Only an advisory agency as designated by California Government Code §66415 has the authority to issue conditions or requirements on this type of development.

In June of 2003 I was 99% completed with my project (I would have been 100% barring City staff's interference) I connected the public school's storm water system to my storm water system in an attempt to obtain Certificates of Occupancy (C.O.) for my project. City staff refused to issue them

The illegal condition morphed and expanded over 22 months from simply connecting the public school's dilapidated storm water system to my own system, until City staff ultimately required me to undertake the public works project of constructing the public school a new storm water system to supplement their dilapidated storm water system, 100% on the public school's property, the whole time depriving me use of property.

On December 4, 2003 I met with CITY STAFF, my engineer and the OUSD to discuss the public work project of me constructing a new storm water system 100% on the school's property.

On February 11, 2004 after my property had been sitting vacant and idle for almost 8 months, City staff issued a letter requiring me to undertake the public works project of constructing the public school a new storm water system 100% on the school's property and I was to do it the following summer as that corresponded to school being out. Senior Oceanside Engineer Scott Smith told me he would hold my property "hostage" to ensure I complied and City staff refused to allow me to occupy my property.

City staff additionally refused to allow me to use existing bonds or post new bonds for the public works project, so I could use my property.

The public school was the *upper property owner*, and I was the *lower property owner*. The new storm

water system was to be constructed 100% on the public school's property, and neither was my property a contributing factor to the public school's dilapidated storm water system and neither did the public school's dilapidated storm water system convey one drop of storm water from my property. There was absolutely no nexus.

During the summer or fall 2003 the City of Oceanside decided they wanted my project for low income housing. The City made me an offer that was less than half of what I believed the value to be. In the spring of 2004 the Oceanside Housing Director (Margery Pierce) called me and told me that if I didn't sell to the City I would never get the public works project for the school approved and that the City would buy my loan note from my lender and finish foreclosing on me. The City fearing I would file bankruptcy instead made a deal to buy my property from my lender after the lender obtained ownership through foreclosure.

City staff held my property "hostage" for years. Because I couldn't obtain certificates of occupancy my lender put my loan into foreclosure. I obtained a new hard money loan in October of 2003 before the foreclosure sale and had to pay approximately $70,000 per month in interest. I also had to cross collateralize it with a 44-unit apartment I had built in 1988 and owned in Seattle. That loan went into default for no C.O. Weeks before the scheduled foreclosure sale in August of 2004 I obtained my third loan and that was at a cost of approximately $150,000 per month.

City staff and the public school dragged their feet and sandbagged me. It took until June of 2005 to get permission from the OUSD to work on their property

and until May of 2006 to get the plans approved. The whole time my property sat vacant, until the loan fees and interest ate up all the capital I had invested, collateral pledged and equity. In July of 2006 I was forced to relinquish control of my property to my then lender in lieu of being foreclosed on In May of 2007 the City finally issued Certificates of Occupancy to a new owner.

In 2005 I applied to do a change in my development plan from an apartment to condominiums. The Oceanside Planning Director denied my application. I appealed it to the Planning Commission pursuit to Oceanside Zoning Ordinance. I personally lobbied all of the Planning Commission members and they all agreed to overturn the Planning Director's decision.

At the July 11, 2005 Planning Commission meeting, City staff and the city attorney refused to allow me my right to an appeal, even over the outburst of the Chairman of Planning Commission (George Barrante) asserting he knows that I have the legal right to appeal. Unbeknownst to me at the time, the City and City staff denied me due process so they could later present new Conditions of Approval for my property to the Planning Commission and include the public works project for the public school in those conditions.

After City staff denied me due process they told me they would submit for a change in the zoning code and that would allow me to do a change in my development plan.

In November of 2005 City staff submitted new Conditions of Approval for the development of my property to the Oceanside Planning Commission. The City was required to first give me notice of when the Planning Commission meeting was and a copy of the

new Conditions of Approval 10 days in advance as an affected property owner. City staff never gave me a copy of the new conditions and I only found about the Planning Commission meeting that day by calling and never had a chance to read the conditions or know what was in them. I was also unaware that City staff was planning on issuing new Conditions of Approval. The new Conditions of Approval required for me to undertake the public works project for the public school and it also required that no C.O.'s would be released until the public works project was completed

By the time that City staff had imposed the illegal demand that I undertake the public works project of constructing the public school a new storm water system, 100% on the public school's property, my permits had ripened into a vested right.

To sum it up, the extortionate and deprivative demands of City staff amounted to a taking of private property, without just compensation. I was not required to first seek some form of administrative relief, (for which there is no short term statute of limitations or legislatively required procedure in California) or judicial relief in the nature of injunction or mandate against the City.

B. MY CASE IS A CONSTITUTIONAL *PER SE* TAKING

My case is very basic and simple. It's a *classic* or *per se* taking and is based upon the 5th Amendment to the U.S. Constitution.[3] My property was taken

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[3] " nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation"

when I had a lawful right to use it and held hostage until I undertook the illegal and illegally imposed, no nexus public works project of constructing a public school a new storm water system. It was a *per se* takings.

The same standards do not apply to regulatory takings that would apply to a *per se* or physical takings. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. *Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency* 535 U.S. 302, 324 (2002)

To understand what would qualify as a *per se* or *classic* takings it's helpful to look at *Lingle v. Chevron U.S A., Inc.*, 544 U.S. 528 (2005).

> The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. *See, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (Government's occupation of private warehouse effected a taking).

In *Lingle*, this Court cited *United States v. General Motors Corp.*, 323 U.S. 373 (1945). General Motors had a long term lease and the government appropriated their lease of the property for a shorter term occupancy. On page 377:

> The critical terms are "property," "taken," and "just compensation." It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. (Emphasis added)

On page 378:

> But it is to be observed that whether the sovereign substitutes itself as occupant in place of the former owner or destroys all his existing rights in the subject matter, the Fifth Amendment concerns itself solely with the "property"—*i.e.*, with the owner's relation as such to the physical thing, and not with other collateral interests which may be incident to his ownership. (Emphasis added)

You can see the distinction and how the different standards apply between a regulatory takings case such as *Penn Central Transp. Co. v New York City*, 438 U.S 104 (1978) where Penn Central was trying to obtain approval for a new building and where the City of New York was allowed to regulate zoning on a historic building versus the *per se* taking of a warehouse in *General Motors*, *supra*, where the government appropriated temporary use of an existing warehouse that was already constructed and vested. General Motors had an absolute right recognized by law to use the existing property. In seeking zoning and land use approvals, there are no absolute or vested rights.

On existing improved property, this Court emphasized in *General Motors*, *supra*, what defines a *per se* taking, is the interference with the owner's right to possess, use and dispose of. The Supreme Court in *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), page 378 said:

> "For the purposes of these cases, it is immaterial whether the Government actually took the leaseholds of the tenants in addition to taking the temporary use of the fee, or only destroyed the tenants' right of occupancy If any property is taken, compensation is required."

The City of Oceanside reaped the benefit of a new storm water system for a public school by seizing and holding my property hostage, but it's immaterial whether the City reaped a benefit in destroying my right to occupy my property or solely destroyed my right to occupy my property. Justice Holmes' characteristically terse statement that "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).[4]

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[4] In *Lingle*, this Court returned to fundamentals of the Constitution and said substantially advances a government interest has no place in takings jurisprudence. When property is taken, the *5th Amendment* concerns itself only with the deprivation to the property owner and "just compensation" The *5th Amendment* is not there to limit good or bad government decision, it's only there to ensure "just compensation" is paid to the owner when the government takes property We can only hope that the government has enough sense that when they willfully take property, they will only do it when and in a fashion that they can receive a reasonable equivalent value for the public as what was taken But if not, the Courts should not

See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U. S. 304, 315 (1987) ("[The Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking")

Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In *Hage v. United States*, 82 Fed Cl. 202 (2008), the Court found a taking when the government stopped Hage from using his vested right to use water In *Hage*, on page 208 the court said:

> The classic example of a taking requiring just compensation is when "the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a 'practical ouster of [the owner's] possession '"

I cannot see a difference in preventing access to a stream of water or a stream of renters and condo buyers. It's all the same, it represents a monetary value to the property owner and enjoyment of use.[5]

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set aside the Constitution to make up for bad government decisions

The Court in *Kimball Laundry Co v United States*, 338 U S 1, 5 (1949) said "Because gain to the taker, on the other hand, may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation "

[5] *Hage*, page 208 The notion of private property is fundamental to the existence of our Nation It is a fundamental

I believe the California Court of Appeals focused on the term "physical taking" and ruled that I had waived a "physical takings" argument at the trial court by not arguing it in a meaningful way. I think their opinion comes from a fundamental misunderstanding of taking jurisprudence and focusing solely on the term "physical taking".

I have always argued a classic or *per se* taking. In defense to the City's Motion for Summary Judgment my attorney filed "SPEIGHTS' MEMORANDUM IN OPPOSITION TO DEFENDAN'T MOTION FOR SUMMARY JUDGMENT", page 4, my heading read·

> This is not a Regulatory Takıng Case Instead ıt's a Case Where the Plaintiff Had a Vested Right and the Defendant's Seızed and Held the Plaıntiff's property Hostage Until He Complied Wıth theır Illegal Demands

If we look at most of the premier U.S. Supreme Court takings cases where a taking was actually found; In *International Paper Co. v. United States*, 282 U.S. 399 (1931), Internatıonal argued a taking, the term

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duty of a government to protect, rather than to destroy, personal property John Locke, TWO TREATISES ON GOVERNMENT §§ 124, 201, 222 ("[w]henever the *legıslators endeavor to take away, and destroy the Property of the People* . . they put themselves ınto a state of War wıth the People, who are there upon absolved from any further obedıence ") (emphasıs ın orıgınal) The Founders of our Natıon envısıoned personal property as a fundamental rıght. It ıs part of the trınıty of values underlying ın our reverence for "lıfe, lıberty, and propcrty " These three ıdeas are all aspects of the fundamental ıntegrıty of each person As the Supreme Court has stated, "[p]roperty does not have rights People have rıghts. The rıght to enjoy property wıthout unlawful deprıvatıon, no less than the rıght to speak or the rıght to travel, ıs ın truth, a 'personal' rıght." *Lynch v Household Fınance Corp* , 405 U S. 538, 552 (1972)

physical taking was never used. The term "requisition" was used and it was a *per se* taking.; In *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) the term physical taking was never used, it was said the government "took possession" and "taking".; *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) the term physical taking was never used, the Supreme Court used the definition of "impoundment of water"., In *United States v. Petty Motor Co.*, 327 U.S 372 (1946) the Supreme Court never used the term physical taking, instead they used the definition "uses was taken" and "taken for public use"., *United States v. General Motors Corp* , 323 U.S. 373 (1945) the Supreme Court never used the term physical taking, instead they used the definition "taken", "seizure", "temporary occupancy taken" and "taken for public use".

What I have argued is simple a taking, a *per se* taking. Where there is seizure, appropriation, or a deprivation of an absolute or vested right, it is a taking. A taking was well argued to the trial court and the briefing was full of inverse condemnation taking cases and authority.

Such as the U.S. Constitution; Article 1, Section 19 of the California Constitution, *Ambrosi v. Alisal Sanitary District*, 154 Cal. App. 2d 720 (1957), sewer district flooded celery crop, *Aetna Life and Casualty Company v. City of Los Angeles*, 170 Cal. App. 3d 865 (1985), Los Angeles power lines burned down homes; *Holtz v. San Francisco Bay Area Rapid Transit Dist.* 17 Cal. 3d 648, 652 (1976), took away the lateral support and damaged the adjoining private property; *Inns v. San Juan Unified School District*, 222 Cal. App. 2d 174 (1963), the public school gathered their storm water and discharged it on the lower private

property owner; *Salton Bay Marina, Inc. v. Imperial Irrigation District*, 172 Cal. App. 3d 914 (1985), Irrigation District flooded private property; *Schneider v. County of San Diego*, 285 F.3d 784 (2001), County seized private property and without due process destroyed it; *United States v. Dickinson*, 331 U.S. 745 (1947), the government flooded Dickinson's property and bypassed eminent domain proceedings. Each of theses cases are what I would consider a *per se* takings case. In *Dickinson*, the U.S. Supreme Court said on page 748:

> This Court has recognized its "shifting meanings" and the danger of determining rights based upon definitions of "a cause of action" unrelated to the function which the concept serves in a particular situation. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 288 U. S. 67 *et seq*
>
> Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness, and not a technical rule of procedure enshrining old or new niceties regarding "causes of action" when they are born, whether they proliferate, and when they die.

I believe, I have clearly argued a cause of action of a *per se* taking. It was an appropriation and deprivation of an absolute property right. I was deprived from physically using my property for the intended purpose in a gainful fashion. Call it a *per se* "taking" or define it as a physical "taking", they're essentially both the same and a taking

Because the trial court was having a hard time seeing it as a taking, my attorney added the argument that it would meet the criteria for a regulatory taking. This was also additionally argued in the Court of Appeal. In the California Supreme Court and this Court it is not being argued.

After some thought I've had to withdraw the argument, I've come to the realization that it wouldn't meet the criteria for a regulatory taking There was no regulation, no ordinance, no zoning code, no condition of approval from a designated Advisory Agency for the grant of a permit, there was only City staff who had the power but not the authority to deprive me of Certificates of Occupancy in conformance with approvals already issued until I undertook a no nexus public works project. I had already complied with all regulations, zoning and land use codes, received lawful permits, completed construction and was vested by the time City staff imposed the requirement of constructing the no nexus public works project 100% on the public school's property.

Under the California Subdivision Map Act City staff has no authority to legislate land use, pass ordinances, zoning law, impose conditions on a development or deprive use. The job of City staff is to follow the conditions of approval issued by the designated and official advisory agency. A City or its employees are not free to deviate from the legislative scheme and exercise *"supreme authority" "willy nilly" "to rule otherwise would make a travesty of the rule that governmental entities must abide by the law" Highland Development Company v. City of Los Angeles* (1985) 170 Cal. App 3d 169. (Emphasis added)

C. THE PERMITS THAT I RELIED AND ACTED UPON RIPENED INTO A VESTED RIGHT THAT COULD NOT BE TAKEN FROM ME, EXCEPT BY A PROCEEDING IN EMINENT DOMAIN

Once a permit that's acted upon in compliance with existing land-use regulation and zoning ripens into a vested right, it cannot be taken, except by a proceeding in eminent domain. *Trans-Oceanic v. City of Santa Barbara*, 85 Cal. App. 2d 776, 783 (1948); *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870). Since it takes a proceeding in eminent domain to take vested property, the government cannot deny a property owner from physically using his/her property for the intended purpose or pass a regulation or issue new Conditions of Approval or in some manner deprive that owner of their right to posses, use, and dispose of their property without paying just compensation or eliminate the liability for their prior deprivative actions that have already worked a taking.[6]

The Court in *Trans-Oceanic,* said in reference to taking a vested property right, page 784:

"It would be nothing short of confiscation, and a complete disregard of constitutional rights, if a muni-

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[6] "[E]stoppel amounts to nothing more than fair play One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch that mat away to the detriment of the party induced to stand thereon A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds . " *Resolution Trust Corp , as Receiver v Town of Highland Beach*, 18 F 3d 1536 (11th Cir. 1994), *vacated and reh'g en banc granted*, 42 F 3d 626 (11th Cir 1994)

cipality could revoke a building permit issued under the conditions as presented in this case."

As a *definitive rule*, anytime it requires a proceeding in eminent domain to appropriate property and deprive use, and those proceeding are bypassed by the government, it is a *per se* taking. The remedy for revoking a vested right is to set the proceedings aside.

See Trans-Oceanic v City of Santa Barbara, 85 Cal. App. 2d 776 (1948), set aside the revocation of a permit and made the revocation of no legal force; *Town of Orange v. John Magee*, 88 N.Y. 2d 41 (1996) set aside the revocation of a permit done without authority of the town ordinance and ordered the payment of substantial damages; *Resolution Trust Corp., as Receiver v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir.1994), *vacated and reh'g en banc granted*, 42 F 3d 626 (11th Cir. 1994), the Town of Highland tried to legislatively regulate a vested property owner out of their vested property rights. The Court made the zoning of no legal effect and ordered the Town of Highland to pay substantial damages., *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990) The City of Pleasanton revoked a lawful permit and rezoned the property. The Court struck it down as unconstitutional and said it was a confiscatory measure.

D. THE PRIOR COURTS APPLIED A FICTICIOUS AND NONEXISTENT STATUTE OF LIMITATIONS THAT EXISTS NEITHER IN STATE OR FEDERAL LAW.

For this Court to properly understand the statute of limitations for this inverse condemnation case, I feel it's necessary to explain how the development

process in California is controlled by the Subdivision Map Act (SMA) and why decisions made by City staff are not covered by the short term statute of limitation prescribed under the California Subdivision Map Act.

In California the development process is controlled by the SMA which is California Government Code sections 66410-66499. It is a very specific and legal process that was set up by the California State Legislature on how to proceed with development. Under the SMA, Advisory Agencies are the only bodies empowered by the state legislature to impose project specific conditions on a development similar to mine.

In a nutshell, this is how the development process works with projects similar to mine. The local Legislative Bodies make zoning and land use regulations, ordinances and laws in conformance with state laws and constitutional provisions.

The developer submits preliminary plans to the local jurisdiction in conformance with existing zoning and land use regulations enacted by the local Legislative Body. The plans are then passed through the local jurisdiction's different departments (such as fire, building, traffic, engineering departments and so on) for comments on how to address various concerns, including life and safety, and how to mitigate the development's impact on the local community.

The local Planning Department then submits the various comments from the different departments and preliminary plans to the official Advisory Agency for approval, denial, or conditional approval. This is done in an open public forum, which allows both the

general public and the property owner to be heard in a meaningful way

Then the Advisory Agency and only the Advisory Agency decides what specific conditions are imposed upon a project as the condition for the grant of a permit.

After approval or conditional approval, Conditions of Approval are issued pursuit to the Advisory Agency's decisions. If satisfied with the Conditions of Approval, the property owner then applies for permits in compliance with the Conditions of Approval. Permits are then issued and if construction is in conformance with already issued plans and permits, then issuance of a C.O. is a ministerial act.

Some of the major problems with City staff circumventing the legislatively prescribed Advisory Agency is that there is no over sight, or the council of many wise and knowledgeable advisory agency members from the local community who often reign in the City staff when they're overreaching Additionally, before proposed conditions are submitted to an Advisory Agency the SMA requires the affected property owner and the surrounding community to be given advance notice and opportunity to be heard in a meaningful way in a public forum before the official Advisory Agency. When City staff or city employees circumvent the prescribed system, the property owner's right to due process, to be heard in a meaningful way, legislatively prescribed safeguards and oversight can be forfeited to that property owner's detriment as well as the local community.

The SMA only gives City staff the authority to submit proposed conditions on this type of development to the official and designated Advisory Agency

for their approval, denial or conditional approval.[7] City employees have no authority to unilaterally impose conditions on this type of development, no more than the police have a right to make their own laws in the field. All areas of government are bound by the rule of law and the authority granted them by that very law.

The Trial Court in granting the City's Motion for Summary Judgment and Court of Appeals both relied on *Hensler v. City of Glendale*, 8 Cal 4th 1 (1994) in setting a short statute of limitations The prior Courts insufficiently analyzed *Hensler* and prescribed a statute of limitations that doesn't exist.

The substance of *Hensler* is that any decision enacted *under authority* of the Subdivision Map Act is governed by the statute of limitations prescribed in Government Code section 66499.37 The key is that the decision has be from a *legislative body, an appeal board or an advisory agency acting under the authority* of the Subdivision Map Act to fall within that prescribed statute of limitations.

The Court in *Hensler*, said on page 7:

> The legislative intent is clear. *Section 66499.37* was enacted to ensure that any challenge to local legislative or administrative acts or decisions taken pursuant to ordinances *enacted* under the authority of the Subdivision Map Act will be brought promptly. (Emphasis added).

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[7] City of Oceanside Zoning Ordinance, Article 4302 (F)(1) This is the local ordinance prescribed in Gov Code section 66415 giving the Planning Commission *authority*

To properly understand *Hensler*, it's necessary to read the statute of limitations in Government Code section 66499.37:

> Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations. Any such proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings.

Government Code section 66499.37 only applies to decisions made by an advisory agency, an appeal board or a legislative body. The Oceanside City staff is neither:

- An Advisory Agency
- An Appeal Board
- Or a Legislative Body

The SMA defines exactly what Advisory Agency and an Appeal Boards are:

> 66415. "Advisory agency" means a designated official or an official body charged with the duty

> of making investigations and reports on the design and improvement of proposed divisions of real property, the imposing of requirements or conditions thereon, or having the authority by local ordinance to approve, conditionally approve or disapprove maps.
>
> Government Code section 66416 "Appeal board" means a designated board or other official body charged with the duty of hearing and making determinations upon appeals with respect to divisions of real property, the imposition of requirements or conditions thereon, or the kinds, nature and extent of the design or improvements, or both, recommended or decided by the advisory agency to be required.

California Courts have already recognized this distinction in 2 different cases. In *Uniwill L.P. v City of Los Angeles* (2004) 124 Cal App. 4th 537, the City of L A. argued Uniwill was under a short 90 day statute of limitations per Government Code §66499.37 and was first required to seek a writ of mandate. The court rejected the argument because it said the City cited no authority why a threat uttered by a city agent needed to be appealed in 90 days and that the city agents had the power but not the authority to deprive Uniwill of its right to a C O. in compliance with lawful permits already issued. In other words, city agents are not an Advisory Agency, Appeal Board or a Legislative Body.

The Court in *People ex rel. Brown v. Tehema County Board of Supervisors,* (2007), 149 Cal. App. 4th 422 reached a similar conclusion, in determining the statute of limitation in Government Code section 66499.37, of the Subdivision Map Act, did not apply to the Planning Director's decision to approve a lot

line adjustment, since the County Planning Director did not qualify as an Advisory Agency, an Appeal Board, or a Legislative Body, within the meaning of the statute The Court also said the Planning Director did not have the authority necessary to make him an Advisory Agency within the meaning of Government Code section 66415 [8]

Decisions made by individual City staff members who have not been granted authority under the SMA and who are not acting under the authority of the SMA are not covered under the statute of limitations prescribed for Advisory Agencies, Appeal Boards or Legislative Bodies in the SMA.

The Court in *Hensler*, page 22:

> Plaintiff argues alternatively that Code of Civil Procedure sections 318, 319, or 338 apply. They do not They are applicable only if no "different limitation is prescribed by statute." (*Code Civ. Proc., § 312.*) *Government Code section 66499.37* is a "different limitation" which now governs actions in which such issues are raised. (Emphasis added)

The California Supreme Court said that if no "different limitation is prescribed by statute" than Code of Civil Procedure sections 318, 319 or 338 apply. This is very clear, unless the City can show

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[8] The Court in *Tehema*, listed the required authority (1) was "charged with the duty of making investigations and reports on the design and improvement of proposed divisions of real property", (2) was "charged with the duty of" "imposing requirements or conditions" "on the design and improvement of proposed divisions of real property"; or (3) "ha[d] the authority by local ordinance to approve, conditionally approve or disapprove maps."

some statute of limitation prescribed for decision made by City staff who have not been granted authority under the SMA, than pursuant to *Hensler*, *supra*, the proper statute of limitations to apply is either *Code of Civil Procedure sections 318, 319*, or *338*, which range anywhere from 3 to 5 years.[9]

Under California law the statute of limitations doesn't begin to run until a party can accurately determine the nature and extent of the taking. *Mehl v. People ex rel Dept of Public Works,* 13 Cal.3d 710, 717 (1975). At the earliest it would be February of 2004, when City staff imposed the requirement of me constructing the public works project 100% on the public school's property. Because of the City's continued course of bad conduct, it could also be determined, to be well into the year 2006 I filed this suit on August 8, 2006. Well within either the 3 or 5 year statute of limitations listed in *California Code of Civil Procedure sections 318, 319, or 338.*

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[9] *United States v Dickinson*, 331 U S 745, (1947) This Court held that in *Dickinson* that where a continuous chain of events or course of conduct is involved the cause of action accrues at the time of the final act in that series of events or course of conduct 331 U S. at 748-49, the purpose of this rule is not only to avoid multiple actions but to allow aggrieved property owners to assess the full extent of their losses before filing suit. This rule has been adopted in California, *Pierpont Inn v California*, 70 Cal.2d 282, 74 (1969)

E. EVEN IF CITY STAFF HAD THE AUTHORITY, WHICH THEY DO NOT, THERE IS NO NEXUS THAT WOULD REQUIRE ME TO ACCEPT THE PUBLIC SCHOOL'S WATERCOURSE WATER OR TO CONSTRUCT THEM A NEW STORM WATER SYSTEM

There is *absolutely* no "nexus" between OUSD's dilapidated storm water system and my property. The OUSD was the *upper property owner* and I was the *lower property owner*. My storm water didn't defy gravity and drain uphill into OUSD's dilapidated storm water system. The storm water system I was forced to construct was 100% for the OUSD's property and constructed 100% on the OUSD's property. It conveyed 0% of my storm water.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994) this Court held that the government cannot require an exaction from a property owner, unless the government can establish a reasonable relationship between the exaction and the impact caused by the new development. In other words, the City would had to have shown that my storm water drained into the public school's dilapidated storm water system and it was a contributing factor to its dilapidation, and the need for a new storm water system. Otherwise, there is no nexus. Without one drop of my storm water running into the public school's storm water system, how then did my project *impact* the public school's dilapidated storm water system? This also makes it crystal clear, that City staff's decision was *arbitrary*, and *capricious Dolan*, *supra*, page 386:

> If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.

In *Dolan, supra,* 391, this Court said the burden rested on the city to prove the exaction doesn't constitutes an *arbitrary* regulation of property rights.

Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

F. DUE PROCESS CLAIM WAS RAISED IN REBUTTAL

The California Court of Appeal stated that I had failed to plead due process without examining the context the issue was raised in, or the fact the City never argued that I didn't have a due process defense.

Even if my attorney didn't adequately plead due process, the City opened the door, in the City's motion for Summary Judgment. On August 22, 2008 the City filed a "CITY OF OCEANSIDE'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT" and asserted on pages 7 & 8 that my failure to challenge the 2005 and 2006 Conditions of Approval with the public works project in it, is "fatal" to my "inverse my condemnation claim".

As rebuttal evidence, I replied on September 22, 2008 in "PLAINTIFF'S MATTHEW SPEIGHTS' 2ND SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT" on pages 7-9 that had the City and City staff not denied me due process of law, that the City would never have had the opportunity to issue the 2005-2006 Conditions of Approval. It is well established that rebuttal evidence consists of a new

matter brought out by the opposing party. *County of Monterey v W. W. Leasing Unlimited*, 109 Cal. App. 3d 636 (1980); *Mass. Bonding v. Ind Acci Com.* 74 Cal. App. 2d 911 (1946).

Due process is not my cause of action, it's only a defense to the City's assertion my suit is flawed because I didn't seek a writ within 90 days of the City Council ratifying the 2005-2006 conditions of approval on January 11, 2006 My cause of action is the government taking of private property for public purposes. 5th Amendment *to the U.S. Constitution.*[10]

Additionally, as the California Court said in *Salton Bay Marina, Inc. v Imperial Irrigation District*, 172 Cal. App 3d 914 (1985) in civil actions, the statute of limitations is a personal privilege and must be affirmatively asserted or it is deemed waived. Likewise, any affirmative defense must be asserted or it is deemed waived. Neither in the trial court, nor in the Court of appeals, has the City ever asserted that I didn't have a due process claim. Their silence is a waiver.

Additionally, there are several different reasons why the 2005—2006 conditions of approval should be set aside.

1. It's in direct contradiction to *First English Evangelical Lutheran Church v. County of Los Angeles* 482 U S. 304, 321 (1987), "no subsequent action" by the government can relieve it of the duty to provide

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[10] In *First English Evan Luth. Church v County of Los Angeles* 482 U S. 304, 314 "Fifth Amendment, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation" Page 310 Fifth Amendment, as made applicable to the States through the Fourteenth Amendment

compensation where government activities have already worked a taking.

2 The Planning Director denied my request to do a change in a development plan and I appealed it to the Planning Commission in July of 2005.[11] At the Planning Commission meeting, I was denied due process and my right to appeal the Planning Director's decision. This was done so City staff could later submit new conditions of approval to the Planning Commission on my property and thus, eliminate any prior liability. Later in November of 2005 when City staff presented the new conditions of approval to the Planning Commission they willfully or negligently failed to give me the required 10 day notice of the hearing and a copy of the conditions of approval in advance.[12]

3. The law generally looks with disfavor on attempts to avoid liability or to secure exemption for one's own negligence *Celli v Sports Car Club of America, Inc* , 29 Cal. App. 3d 511, 518 (1972).

4. Unlawful Contracts: Civil Code §1668. All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

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[11] Article 4309 (A) of the Zoning Ordinance saying "Development plan decisions of the Planning Director may be appealed by any interested party" It places no limitations on appealing development plan decisions Under Article 4309 (D) allows for a change in a development plan

[12] City of Oceanside Zoning Ordinance, Article 4305 (D)(2) requires a notice be sent to the affected property owner 10 days prior to the public hearing in front of the Planning Commission

5. *Dolan v. City of Tigard*, 512 U.S. 374 (1994), page 385: Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. Here, my right to receive just compensation.

The typical remedy for denial of due process is to simple set the proceeding aside and pay damages. *See Trans-Oceanic v. City of Santa Barbara*, 85 Cal. App. 2d 776 (1948) set aside the revocation of a permit done without due process and made the revocation of no legal force; *Town of Orange v. John Magee*, 88 N Y 2d 41 (1996) set aside the revocation of a permit done without due process and authority of the town ordinance and ordered the payment of substantial damages; *Resolution Trust Corp., as Receiver v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir 1994), *vacated and reh'g en banc granted*, 42 F.3d 626 (11th Cir. 1994), the Town of Highland tried without due process and fair hearing to legislatively regulate a vested property owner out of their vested property rights. The Court made the zoning of no legal effect and ordered the Town of Highland to pay substantial damages.; *Wheeler v City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990) The City of Pleasanton revoked a lawful permit without due process and rezoned the property The Court struck it down as unconstitutional and said it was a confiscatory measure and ordered the city to pay damages; *Schneider v. County of San Diego*, 285 F.3d 784, (2001) the county seized property and without due process destroyed the property and had to pay damages

42 U.S.C § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

G. FEDERAL ISSUE RAISED IN LOWER COURTS

At the Trial Court level in "PLAINTIFF MATTHEW SPEIGHTS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT" on page 15:

"The theory is based upon "just compensation" both from the California Constitution and the U.S. Constitution."

On Page 20:

"*Fifth Amendment of the United States Constitution* prohibiting the taking of private property for public use without just compensation. The *supremacy clause of the United States Constitution* binds the courts of this state to require just compensation notwithstanding anything in the Constitution or law of this state to the contrary (U.S. Const., art. VI, cl. 2.)"

In the "PLAINTIFF AND APPELANT'S OPENING BRIEF" on page 16.

"This is because the authority for prosecution of an inverse condemnation proceeding derives from the Fifth and Fourteenth Amendment to the U.S Constitution . . nor shall private property be taken for public use, without just compensation."

Page 33:

"It becomes an undeniably right by law to exist. *U.S. Constitution, 5th & 14th Amendment*"

Page 43:

"It sets a bad precedent for public policy to say that a planning department or other public agency can obtain and keep the benefit received from depriving a person their due process of law and violating their constitutional civil liberties *U.S. Constitution, 14th Amendment*"

On page 2 of the Court of Appeal's decision:

"On appeal, Speights advances several arguments presumably intended as a foundation for one over-arching theme that he had a state and federal constitutional "vested" property right to use his property, which right cannot be "regulated away." Speights contends that as to this vested right, he was subjected to both physical and regulatory takings, as well as unreasonable precondemnation conduct and due process violations by City."

H. CITY OF OCEANSIDE'S UNDISPUTED MATERIAL FACTS

City of Oceanside's undisputed material facts No. 15:

"*On April 30, 2002, when Speights' construction crew was using grading equipment on the School District's land, the construction crew impacted and damaged a storm water drainage line.*"

City of Oceanside's undisputed material facts No. 17:

"*At his deposition, Speights testified that "once it [the School District Line] was uncovered, it drained onto my property* "

City of Oceanside's undisputed material facts No. 18:

"Speights alleges in the First Amended Complaint and in discovery that after the City learned about the additional storm water draining onto the Property from the School District Line, it required Speights to "fix" the problem presented by the School District's Line."

City of Oceanside's undisputed material facts No 37:

"The 2005 Development Plan included a condition requiring that Speights design and construct the storm water drainage facilities per current City standards prior to issuance of any permits or certificates of occupancy or approval of the final map."

City of Oceanside's undisputed material facts No. 38:

". . . engineering plans for the storm water drainage facilities be approved by the Deputy Public Works Director"

City of Oceanside's undisputed material facts No. 44:

"Improvements constructed for Speights' alternate solution were entirely on the School District's property."

City of Oceanside's undisputed material facts No 46:

"Because the improvements to address the School District's Line were completely on the School District's Property, . . ."

City of Oceanside's undisputed material facts No. 55:

The City issued a Utility Release and Occupancy Authorization for both buildings constructed during the project on or about May 16, 2007.

City of Oceanside's undisputed material facts No. 56:

The completed project as it stands today is comprised of two three story buildings with 11 units each, which is essentially the same as the construction Speights originally proposed on or about 2001.

CONCLUSION AND RELIEF SOUGHT

Based primarily upon the City's of Oceanside's undisputed material facts, I ask this Court to reverse the California state Courts and find the City of Oceanside, California liable for a 5th Amendment taking of private property and order this case to brought before the Western Washington Federal District Court in the Ninth Circuit, in Seattle, Washington for trial by jury for a determination of what compensation is due under California law and for what other relief this Court deems just and equitable.

Respectfully submitted,

MATTHEW SPEIGHTS, *Pro se*
18831 2nd Ave S.W.
Seattle, WA 98166
(206) 359-1343

December 3, 2009

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA
En Banc

S174587
Court of Appeal, Fourth Appellate District,
Division One - No D054122

MATTHEW SPEIGHTS,
Plaintiff and Appellant,

v.

CITY OF OCEANSIDE *et al.*,
Defendants and Respondents.

The petition for review is denied.

The request for an order directing publication of the opinion is denied.

/s/ Frederick K. Ohirich Clerk
Frederick K. Ohirich Clerk
Deputy

/s/ GEORGE
GEORGE
Chief Justice

Mark Anthony Brencick
Landmark Consulting
9555 Genesee Ave #200
La Jolla, CA 92121

APPENDIX B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
NORTH COUNTY

MINUTE ORDER

Date: 10/07/2008 Time: 09:00:00 AM
Dept: N-29

Judicial Officer Presiding: Judge Robert P. Dahlquist
Clerk: Lynn Arthur

Bailiff/Court Attendant:
ERM

Case Init. Date: 08/08/2006

Case No: GIN057318-1

SPEIGHTS

vs

CITY OF OCEANSIDE

Case Category: Civil-Unlimited
Case Type: Eminent domain/Inverse condemnation

Event Type: Summary Judgment/Summary Adjudication (Civil)
Causal Document & Date Filed:

Appearances:

The Court, having taken the above-entitled matter under submission on 09/17/2008 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

> Defendants City of Oceanside and Oceanside City Council's motion for summary judgment is granted.
>
> Summary judgment is appropriate in this inverse condemnation case pursuant to *Hensler v. City of Glendale* (1994) 8 Cal.4th 1. *Hensler* requires a plaintiff in a regulatory takings inverse condemnation case to challenge the allegedly offending regulatory conduct by writ of mandamus before, or simultaneous with, pursuing a claim for monetary compensation. In this case, it is undisputed that Plaintiff Speights is pursing a claim for a regulatory taking. It is also undisputed that Speights did not challenge the offending regulatory conduct by writ of mandamus before bringing this lawsuit for damages Under *Hensler*, Speights' claim is barred because Speights failed to give the City an opportunity to correct the allegedly offending regulatory conduct via the filing of a petition for writ of mandamus before suing for money damages
>
> "The requirement that challenges to administrative actions constituting takings be brought initially by administrative mandamus assures that the administrative agency will have the alternative of changing a decision for which compensation might be required. If no such early opportunity were given, and instead, persons

> were permitted to stand by in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative action resulted in a taking for public use, meaningful government fiscal planning would become impossible." *Hensler*, 8 Cal.4th at 27-28, quoting *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App 4th 592, 612.

The above two paragraphs contain a summary of the basis for the Court's ruling on the City's motion. The remaining paragraphs of this ruling provide additional details concerning the Court's consideration of the City's motion.

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal 4th 826, 850. A defendant satisfies this burden by showing "one or more elements of the 'cause of action' in question 'cannot be established' or that 'there is a complete defense'" to that cause of action. *Ibid.*

In order to assert an inverse condemnation cause of action, plaintiff must allege and prove that: (1) plaintiff owned the relevant real property; (2) the property was taken or damaged, (3) the cause was a public project; and (4) causation. Cal. *State Automobile Assn. v. City of Palo Alto* (2006) 138 Cal.App.4th 474, 480.

An inverse condemnation claim may be based on an alleged physical taking or a regulatory taking. In this case, Plaintiff Speights is not presenting a claim based on a physical taking. *See* Plaintiffs Supplemen-

tal Opposition Brief at 2. The only other option is that the alleged taking was regulatory. *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 536-540.

This case was filed in August 2006. During the two years that the case has been pending, the parties have engaged in a significant amount of motion practice and discovery. As a result, the parties' legal positions have become more refined and many of the critical facts of the case are now undisputed. An earlier summary judgment motion was denied by Judge Schall because there were disputed issues of material fact at that time. The pending motion arises under different circumstances because the material facts are not in dispute at this time.

The City's separate statement of facts in support of its motion for summary judgment lists 56 undisputed facts. Plaintiff Speights' responsive separate statement disputes only 5 of the City's facts, and none of those 5 disputed facts are material to the issues to be decided here. In short, all of the material facts pertinent to this motion are undisputed.

The facts of this case are as follows:

Plaintiff Speights acquired a parcel of real property in Oceanside and obtained conditional approval in 2001 to construct an apartment complex on the property. The approval required Speights to design grading and drainage facilities to accommodate local runoff. In particular, the City's approval of Speights' development plan stated: "All storm drain systems shall be designed and installed to the satisfaction of the City Engineer The drainage design on the development plan is conceptual only; the final design shall be based upon a hydrologic/hydraulic study to be approved by the City Engineer during final engineering. All

drainage picked up in an underground system shall remain underground until it is discharged into an approved channel, or as otherwise approved by the City Engineer." Ex. 2 to Declaration of Peter Weiss.

During construction, when Speights' construction crew was using grading equipment on neighboring land owned by the School District, the construction crew impacted and damaged a storm water drainage line. The damaged storm water drainage line drained onto Speights' property Speights connected the School District drainage system to the system on his own property without the City Engineer's approval. Speights contends that he proceeded in this fashion, without the City's approval, because the City's approval was unreasonably delayed and Speights' construction loan was going into default or foreclosure *See* Plaintiff Speights' Response to Defendants' Separate Statement, Fact No. 19.

Thereafter, in 2004, the City issued Speights a Temporary Certificate of Occupancy. A condition of the Temporary Certificate of Occupancy required Speights to re-design the unapproved storm drainage system, and install a system approved by the City Engineer. *See* Plaintiff Speights' Response to Defendants' Separate Statement, Fact No 21. Speights contends that, as of that point in time (February 2004), the project "was entitled to a permanent certificate" of occupancy, not a conditional temporary certificate. *Id.* at Fact No. 21.

In 2005, the City approved a revised Development Plan for the property. The 2005 Development Plan allowed Speights to complete the project as a condominium project. The City's approval of the 2005 plan was conditioned upon, among other things, a requirement that Speights design and construct storm water

drainage facilities per current city standards and as approved by the city engineer *See* Plaintiff Speights' Response to Defendants' Separate Statement, Facts 33-38. Speights asserts that these conditions were improper, and that the City "could not hold his property 'hostage' and require him to accept the School District's 'watercourse' water after he was vested." *Id.* at Fact 35, 37.

The City Council approved the 2005 Development Plan at a meeting in January 2006. The City Council Resolution approving the plan contained the following statement: "NOTICE IS HEREBY GIVEN that the time within which judicial review must be sought on this decision is governed [by] CCP Section 1094.6." *See* Plaintiff Speights' Response to Defendants' Separate Statement, Fact 42.

Speights eventually constructed additional storm drainage facilities that complied with the 2005 Development Plan. The cost of constructing these additional storm drainage improvements is disputed. The City contends that the cost was approximately $140,000. Speights contends that the $140,000 "figure would not include much of the cost' and leaves out "design, attorney, and damages to Speights." *See* Plaintiff Speights' Response to Defendant's Separate Statement, Fact 45.

In or about February 2007, Speights sold his interest in the entity that owns the property Hence, Speights no longer owns the property. Speights contends that he "sold the property under extreme duress, and retained his claims against the City post-sale." *See* Plaintiff Speights' Response to Defendant's Separate Statement, Facts 49-50. In addition, Speights asserts that he had "a vested right and his property was held

hostage until he complied with the illegal demands of the city." *Id.* at Fact 53.

Speights commenced this lawsuit for inverse condemnation in August 2006. According to his First Amended Complaint, Speights is seeking damages in excess of $12 million from the City on account of the City's alleged taking of his property by inverse condemnation.

Speights did not seek review, by writ of mandamus, of any of the regulatory actions that underlie his claim for inverse condemnation prior to, or simultaneous with, the filing of his complaint for monetary compensation. Speights did not file a petition for writ of mandamus with respect to any of the land use approvals issued by the City. He also did not file a petition for writ of mandamus seeking to compel the City to issue any permit or approval to which he now contends he was entitled.

As mentioned above, the Court believes that Speights' claims for monetary compensation are barred because he did not exhaust his administrative remedies as required by *Hensler*. Under *Hensler*, an inverse condemnation plaintiff in a regulatory taking case must file a petition for writ of mandamus to challenge the offending regulatory conduct that is alleged to constitute a taking before, or simultaneously with, seeking compensation for the alleged taking.

In addition to *Hensler*, several other cases appear to be instructive In each case, the property owner tried to assert inverse condemnation claims for damages allegedly caused by conditions imposed by land use approvals without first challenging those conditions by petitions for writ of mandamus. *See Briggs v. Rolling Hills Estate* (1996) 40 Cal App.4th

637, 646 [summary judgment affirmed]; *Patrick Media Group, Inc. v. Cal. Coastal Comm.* (1992) 9 Cal.App.4th 592, 611-13 [judgment against agency reversed and case ordered dismissed]; *Rossco Holdings, Inc. v. State of California* 1989 212 Cal.App.3d 642, 658 [issue addressed on demurrer]; *County of Imperial v McDougal* (1977 19 al.3d 505, 510-11; *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 452 [Judgment on pleadings a affirmed].

The principles underlying *Hensler* and these other cases appear to be applicable in this case. Regardless of whether Speights is relying on the allegedly improper conditions contained in the City's land use approvals or the City's alleged conduct in refusing to issue earlier permanent occupancy permits as the basis for his claims for money damages, the City should have been apprised of its allegedly offending regulatory conduct and should have been given an opportunity to correct that offending conduct through administrative writ proceedings before potentially being held liable for monetary damages in this inverse condemnation case.

Speights argues that he was not required to file a writ of mandamus before suing for money damages, relying primarily on *Uniwill v. City of Los Angeles* (2004) 124 Cal.App.4th 537. *Uniwill* is not on point because it is a physical takings case, not a regulatory takings case. *Uniwill* involved the taking of an easement. In the physical taking context, the government agency knows that it will be required to pay reasonable compensation for the physical taking. There is no need for a writ of mandamus to put the agency on notice of the potential need to compensate.

In contrast, in the regulatory takings context, the agency has no notice that someone might be aggrieved

by regulatory action and that the agency might have to pay money to an aggrieved party until a writ of mandamus provides notice to the agency that the landowner is aggrieved and may seek monetary compensation. In the regulatory context, the writ of mandamus gives the agency an opportunity to potentially change course to avoid a claim for compensation.

Speights also argues that he had vested rights, and the City was not permitted to interfere with his vested rights. It appears that Speights' vested rights argument does not defeat the City's defense in this case. Speights' obligation to address drainage conditions to the satisfaction of the City Engineer was included in the initial 2001 Development Plan Before Speights can seek damages under an inverse condemnation theory for regulatory inference with his claimed vested rights, he was required to file a petition for writ of mandamus to set aside any conditions of approval or any actions by the City that allegedly infringed his vested rights.

IT IS SO ORDERED.

October 7, 2008

/s/ ROBERT P. DAHLQUIST
ROBERT P. DAHLQUIST

APPENDIX C

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE
DISTRICT DIVISION ONE
STATE OF CALIFORNIA

D054122
(Super. Ct No. GIN057318-1)

MATTHEW SPEIGHTS,
Plaintiff and Appellant,

v.

CITY OF OCEANSIDE *et al.*,
Defendants and Respondents.

Filed 6/18/09

APPEAL from a judgment of the Superior Court of San Diego County, Robert P. Dahlquist, Judge. Affirmed.

Matthew Speights appeals from a summary judgment in favor of the City of Oceanside and the Oceanside City Council (collectively City) on his first amended complaint for inverse condemnation. In granting summary judgment, the trial court ruled that Speight's claim was based on a regulatory taking theory and thus he was required to challenge the assertedly offending regulatory conduct by writ of mandamus before or simultaneously with his claim for monetary compensation.

On appeal, Speights advances several arguments presumably intended as a foundation for one overarching theme: that he had a state and federal constitutional "vested" property right to use his property, which right cannot be "regulated away." Speights contends that as to this vested right, he was subjected to both physical and regulatory takings, as well as unreasonable precondemnation conduct and due process violations by City. Speights contends the authority on which the trial court relied in granting summary judgment—*Hensler v. City of Glendale* (1994) 8 Cal.4th 1 (*Hensler*)—is an inapposite statute of limitations case and does not compel summary judgment in City's favor. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The undisputed material facts are taken from the parties' separate statements filed in connection with City's summary judgment motion and other facts in the light most favorable to Speights as the losing party. (Code Civ. Proc., § 437c, subd. (c); *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97.)[1]

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[1] Though we are bound to view Speights's evidence liberally, we are compelled to note that his factual statement contains assertions and conclusions that we do not consider Some assertions are regarding the nature of the storm water flow from his property whose sole record support is topographical and other maps and drainage plans that were part of a hydrology study. For example, Speights asserts "In the [drainage] report and plans, the storm water from Speights' [*sic*] property, was gathered through a series of catch basins, artificial drainage ditches and pipes, and then exited on the middle, east side, of his property, through a 24" RCP From there it continued running in a southeasterly direction across the Riverview Townhomes property, then running under N River Road, then into the San Luis Rey River where it was discharged Essen-

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tially, running down hill and following gravity until connecting with a major riparian watercourse." (Italics omitted.) To draw these kinds of conclusions from maps alone requires support by expert testimony. (*Cf* Evid Code, § 801, subd (a) [expert testimony is proper if "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"]) In any event, the assertions were not made in Speights's opposing summary judgment declarations or opposing separate statement of material facts, and for that reason we do not consider them (*Sangster v. Paetkau* (1998) 68 Cal App 4th 151, 163 [on appeal from summary judgment, appellate court may consider only those facts that were before the trial court and disregard any new factual allegations made for the first time on appeal, "Thus, unless they were factually presented, fully developed and argued to the trial court, potential theories which could theoretically create 'triable issues of material fact' may not be raised or considered on appeal"], *Peart v Ferro* (2004) 119 Cal App 4th 60, 70) Other assertions are made without record citation Still others are supported by citations to Speights's first amended complaint or opposing summary judgment points and authorities. Summary judgment cannot be defeated by a plaintiff's reliance on conclusionary or argumentative assertions without evidence or on allegations of the complaint (*Roberts v Assurance Co of America* (2008) 163 Cal App.4th 1398, 1404; *Crouse v Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524 [to avoid summary judgment, party must produce admissible evidence raising a triable issue of fact], see also Code Civ Proc , § 473c, subd (p)(2), *Aguilar v Atlantic Richfield Co* (2001) 25 Cal 4th 826, 849, *Conte v Wyeth, Inc* (2008) 168 Cal App 4th 89, 97 [to defeat summary judgment plaintiff must show specific facts and cannot rely on the allegations of the pleadings]) However, we do consider all of the evidence offered in Speights's supplemental briefing in the trial court because there is no indication City objected to the trial court's consideration of that evidence. (*See Lonicki v Sutter Health Cent* (2008) 43 Cal.4th 201, 206 [on appeal from summary judgment, reviewing court must consider ""all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained""]) On that same principle, we consider City's evidence concerning the prop-

In May 2001, Speights received planning commission approval of a development plan on 1.5 acres of property in the City of Oceanside that he had purchased in 2000 for $195,000. Speights's property is adjacent to property owned by the Oceanside Unified School District (the District). The 2001 development plan contained several conditions involving drainage; one required that "[g]rading and drainage facilities shall be designed to adequately accommodate the local storm water runoff and shall be in accordance with the City's Engineers Manual and as directed by the City Engineer." Others required storm drain systems to be designed and installed to the city engineer's satisfaction, and required the final drainage design to be based on a hydrologic/hydraulic study to be approved by the city engineer during final engineering. Another stated "Storm drain facilities shall be designed and located such that the inside travel lanes on North River Road, downstream of the subject property, be passable during conditions of a 100-year frequency storm." The conditions placed responsibility on Speights to dedicate all storm drain easements where required and obtain any off-site easements for storm drainage facilities.

On April 10, 2002, City approved Speights's precise drainage and grading plans, which required Speights to over excavate the site four to six feet below grade. Speights had advised the District that he would be excavating along their common property line and would leave its property in its original condition. He commenced grading and observed no evidence of drainage from the District property. During that

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erty's $195,000 purchase price, to which Speights objected without obtaining a ruling on his objection

month, Speights posted bonds in the amount of $294,289 and committed to a $2.7 million construction loan, committing to another $736,788 by the end of the month. On April 30, 2002, Speights's construction crew impacted and damaged a subsurface storm water drainage line located on the District's property. After the end of the pipe was uncovered, some of the water began to flow onto the District's and Speights's properties.

Speights promptly notified City of the pipe's discovery, proposed to repair its uncovered end, rebury it and return the property to its former condition. City rejected that proposal and required him to address the problem at his expense before it would issue a certificate of occupancy. In late 2002, Speights hired engineers to prepare a drainage report and plans to resolve the issue. He also hired a surveying firm to prepare an easement in City's favor for the pipeline route through his property. At about this time, Speights was making inquiries with City staff about changing his development plan from apartments to condominiums.

In February 2003, when Speights's project was about 70 percent complete, his engineering company advised him that City wanted him to increase the size of a drain pipe under North River Road. Speights's engineers submitted their plans, but City did not approve them. Speights's additional efforts to obtain City's plan checker's approval were unavailing.

In June 2003, facing foreclosure on his construction loan, Speights installed a drainage line running across a portion of the District's property and his own property, which connected the District's system to his own. He did so without City approval due to its delay in responding to his submittals concerning the

drainage issue. At some point during 2003, Speights asked City to allow him to post a bond for the drainage improvements so he could begin renting the units and receiving income to avoid foreclosure. City refused his request.

In February 2004, City issued Speights a temporary certificate of occupancy requiring him in part to redesign, secure and install the storm drain system to the city engineer's satisfaction, base the storm drain's final design on a hydrologic/hydraulic study approved by the city engineer, assume responsibility for obtaining any off-site easements for storm drainage facilities, and make and complete the storm drain improvements between July and August 2004 during the adjacent elementary school's summer break. Despite issuance of the temporary certificate of occupancy, Speights could not rent or refinance the project because City refused to issue approvals to hook up gas meters. Speights agreed to the conditions under pressure due to his financial condition.

In March 2004, City representatives began considering purchasing Speights's property, noting Speights's financial trouble and internally characterizing the matter as a "golden opportunity" to realize an affordable rental project. Speights authorized City to contact his first mortgage lender to discuss the possible acquisition. At some point, City's director of housing, Margery Pierce, called Speights and told him that if he did not take City's offer, it would buy his note and finish foreclosing on him, and he would not get his storm drain approvals. In April 2004, City offered to purchase the property for $4.4 million. Speights rejected the offer. He later refinanced his construction loan with different lenders

and used the property (and other properties he owned) as collateral for those loans.

After City's purchase offer, Speights submitted a request for a change in his development plan and a new application to convert his project to condominiums. The planning director rejected the request. In June 2005, he unsuccessfully attempted to appeal the planning director's decision and eventually provided City with a legal opinion from his attorney explaining why he was entitled to change his development plan. In November 2005, City's planning commission adopted a resolution approving a zoning amendment, tentative map, conditional use permit and revision to the property's development plan for condominium conversion. The resolution noted the inadequacy of existing downstream storm drains and acknowledged Speights's proposal to construct new storm drain facilities between the project site and an existing concrete storm drain channel running along the west side of North River Road, approximately 730 feet east of the site.[2] It also included numerous

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[2] The planning commission resolution states "The drainage report submitted with this Tentative Map by the developer's engineer reveals that existing and previously proposed downstream storm drain facilities are inadequate to handle runoff from this development Consequently, the Developer proposes to construct new storm drain facilities between the project site and the existing concrete storm drain channel that runs along the westerly side of the North River Road Park, approximately 730 feet east of the project site The proposed system will be adequately sized to handle runoff from the project site and from all contributing drainage areas The developer shall design and construct said facilities per current City standards prior to issuance of any permits or certificates of occupancy or approval of the final map Engineering plans for said facilities shall be approved by the Deputy Public Works Director. The developer shall arrange recordation of adequate easement(s) and main-

conditions relating to storm water drainage, including requiring engineering plans be approved by the City's deputy public works director, and requiring storm drain facilities to be "designed and located such that the inside travel lanes on streets with Collector or above design criteria shall be passable during conditions of a 100-year frequency storm."

In January 2006, the City Council adopted a resolution approving a conditional use permit and incorporating all of the planning commission's findings and conditions from its November 2005 resolution. The resolution provides, "NOTICE IS HEREBY GIVEN that the time within which judicial review must be sought on this decision is governed [by] Code of Civil Procedure Section 1094 6 "

Speights eventually implemented the drainage solutions outlined in the 2005 development plan, which improvements were constructed entirely on the District's property. However, at some point in 2006, his lender demanded that he assign control of the property to the lender's attorney in lieu of foreclosure. Because the improvements were on the District's property, Speights never dedicated easements on his property to City, though Speights had previously paid professionals to prepare drainage plans and easement documents. The District conveyed an easement to City for the storm water drainage facilities constructed on its property.

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tenance agreements(s) for said storm drain facilities prior to issuance of any permits or certificates of occupancy or approval of the final map The easement document(s) and the maintenance agreement(s) shall be approved by the Deputy Public Works Director and the City Attorney and shall run with the properties involved in perpetuity "

In August 2006, Speights filed a complaint against City, the Oceanside City Council, and others, alleging a single cause of action for inverse condemnation. In part, he alleged his property was diminished in value, thereby effecting a taking and/or damaging for public use without payment of just compensation, by City's "unreasonable, oppressive and unlawful" actions, which "coerced [him] into agreeing to convey easements for stormwater drainage lines to City and to pay the costs of designing and installing said lines at exorbitant costs. . . ." The trial court overruled City's ensuing demurrer, ruling Speights had alleged facts sufficiently showing unreasonable precondemnation conduct by City and improper burdensome requirements imposed during project construction

In early 2007, Speights's lender negotiated a sale of the property, and Speights sold it and his related business interest for $6.22 million to avoid foreclosure. City issued occupancy authorization in May 2007, and the project was eventually completed essentially as Speights had originally proposed.

In July 2007, City moved for summary judgment on grounds (1) Speights could not make out an inverse condemnation claim under a theory of unreasonable precondemnation conduct under *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 (*Klopping*) because there was no evidence City ever intended to take the property through eminent domain; (2) Speights's claim that City took his property by imposing storm water drainage conditions was time-barred because he did not challenge City's imposition of the conditions within 90 days, (3) Speights's takings claims were barred by res judicata and waived by his failure to seek review of City's determinations by a petition for writ of administrative mandamus. The trial court

denied the motion on grounds City did not meet its threshold burden of proof on these issues.

In early 2008, Speights was granted leave to file a first amended complaint for inverse condemnation. Among other corrections and modifications, Speights added allegations that City "unreasonably demand[ed] that Plaintiff entirely replace and 'upsize[,'] at Plaintiff's sole cost and expense, an existing, deficient City-owned drainage facility" before he could obtain a certificate of occupancy, which requirement was in excess of City's police powers, violated certain constitutional principles, and was improperly imposed to facilitate City's acquisition of the project. Speights also alleged City staff improperly blocked and delayed his proposed condominium conversions to create duress, thus allowing City to acquire the project more cheaply. Speights's first amended complaint survived City's second demurrer and motion to strike

City again moved for summary judgment. It argued Speights could not prove a takings claim based on any theory; he did not dedicate his property to City and there was thus no physical occupation, and he could not prove a regulatory taking because "the economic impact of addressing drainage requirements was small, the City's drainage requirements had no effect on investment-backed expectations because the project was eventually completed essentially as originally planned, and the character of the City's action was a proper regulation of storm water to address flooding risks." City also argued Speights could not rely upon cases decided in the context of land use exactions (*e g., Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 538 (*Lingle*)) because he denied he was challenging formal adjudicative land use

exactions and the only easement dedicated to City was on the District's, not Speights's, property. City finally argued Speights had no claim for diminution in value based on unreasonable precondemnation conduct because no eminent domain action was threatened or pending, and there was no "condemnation cloud" on the title.

Speights opposed the motion, asserting that his case "[did] not fit into either category" of regulatory taking, but rather was about City "imposing oppressive and illegal requirements after the start of construction when [he] was vested." He argued, inter alia, his "vested right" exempted him from making any preliminary challenges under the Government Code or otherwise exhausting his remedies. In reply, City pointed out that Speights's previously unasserted "vested rights doctrine" was not a takings theory or a constitutional claim for damages. It maintained that a plaintiff would need to prove a taking under a recognized theory even where vested rights were at issue. City further argued that the 2005 development plan and 2006 city council resolution required Speights to construct the storm water drainage improvements at issue, and Speights's failure to challenge those approvals by petition for writ of mandamus barred his inverse condemnation action.

At oral argument on the matter, Speights's counsel clarified that Speights was relying on a theory of regulatory taking caused by City's conduct. Based on that clarification, the trial court continued the hearing to permit the parties to file supplemental briefing. In his supplemental brief, Speights addressed the factors and ad hoc balancing test set out for regulatory takings in *Kavanau v. Santa Monica*

Rent Control Board (1997) 16 Cal.4th 775 (*Kavanau*), arguing the "interpretation" of those facts was "greatly disputed." He distinguished the cases relied upon by City, and repeated his argument that he had a "vested right and the City imposed illegal requirements after vesting" without an "'essential nexus'" as required by *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*) and *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 (*Nollan*). Speights reemphasized that his takings claim was based on City's precondemnation conduct, which "took away [his] ability to use his property for a substantial period of time, until it was lost."

In its supplemental filing, City argued Speights had abandoned all theories other than one under the ad hoc test for regulatory takings; his reliance on *Nollan* and *Dolan*, precondemnation cases, and vested rights cases failed because he had never dedicated an easement; there was no eminent domain action; and it had not imposed "new" or "additional" development conditions after the start of construction. City again maintained Speights's failure to challenge its approval of the conditions by petition for writ of mandate barred his action as a matter of law.

Following arguments on the matter and additional briefing as well as submission of a supplemental declaration from Speights, the trial court granted City's motion. It observed there was no dispute that although Speights was pursuing a claim for regulatory taking, he did not challenge City's regulatory conduct by petition for writ of mandamus before filing suit. It ruled under *Hensler*, *supra*, 8 Cal.4th 1 and other cases, Speights's inverse condemnation claim was barred. This appeal followed.

DISCUSSION

I. Summary Judgment Standards

"""A motion for summary judgment must be granted if all of the papers submitted show 'there is no triable issue as to any material fact and . . the moving party is entitled to a judgment as a matter of law. In determining whether the papers show . . . there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, . . . and all inferences reasonably deducible from the evidence . .' ([Code Civ. Proc.,] § 437c, subd. (c).) A defendant has met its burden of showing a cause of action has no merit if it 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show . . a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show . . . a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . .'"" (*Skoumbas v. City of Orinda* (2008) 165 Cal.App.4th 783, 790-791.)

"In meeting its overall burden of persuasion, the defendant has the initial burden of production entailing him to 'present[ ] . . "evidence"' [citation] supporting a prima facie showing of the nonexistence of any triable issue of material fact as to the defense. [Citation] Once the defendant has met that initial burden of production, the burden shifts to the plaintiff to present evidence showing the existence of a triable issue of one or more material facts as to that defense " (*Rancho Viejo LLC v Tres Amigos Viejos*

LLC (2002) 100 Cal.App.4th 550, 558.) "'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof at trial.' (*Ibid.*)

On appeal, the reviewing court exercises its independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334-335.) We view the evidence in the light most favorable to Speights as the losing party, construing City's evidence strictly and Speights's evidence liberally, and resolve any doubts as to the propriety of granting the motion in Speights's favor. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499; *Rancho Viejo LLC v. Tres Amigos Viejos LLC*, *supra*, 100 Cal.App.4th at p. 558.)

II. Overview of Takings Jurisprudence

Because Speights relies on several different theories by which he contends he suffered a compensable taking, it is helpful at the outset to provide a brief overview of the pertinent legal principles relating to the categories of governmental takings.

The state and federal Constitutions guarantee real property owners "just compensation" when their land is taken for a public use. (Cal. Const., art. I, § 19; U.S. Const., Fifth Amend.; *Shaw v County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259, *citing Lingle*, *supra*, 544 U.S 528 & *Kavanau*, *supra*, 16 Cal 4th 761, 773.) The California Constitution also requires just compensation when private property is "damaged for a public use." (Cal. Const., art. I, § 19; *Herzberg v. County of Plumas* (2005) 133 Cal.App 4th 1, 13.) By

including damage to property as well as its taking, California "'protects a somewhat broader range of property values' than does the corresponding federal provision." (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664; Herzberg, at p. 13.)

"'The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property'—a categorical taking " (*Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at p. 260.) "When property is damaged, or a physical invasion has taken place, an inverse condemnation action may be brought immediately because an irrevocable taking has already occurred." (*Hensler, supra*, 8 Cal.4th at p. 13; *see Hurwitz v. City of Orange* (2004) 122 Cal.App.4th 835, 847-848.)

Additionally, "'government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and . . . such "regulatory takings" may be compensable under the Fifth Amendment.' [Citation.] The United States Supreme Court has recognized 'that a regulation of property that "goes too far" may effect a taking of that property, though its title remains in private hands. In such a case, the property owner may bring an inverse condemnation action, and if it prevails, the regulatory agency must either withdraw the regulation or pay just compensation. [Citation.] Even if the agency withdraws the regulation, the property owner may have a right to just compensation for the temporary taking while the regulation was in effect.'" (*Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at p. 260.)

"Two categories of regulatory action will generally be deemed per se compensable takings. First, where

government requires an owner to suffer a 'permanent physical invasion' of his property for such things as cable lines, it must provide just compensation. [Citations.] Second, where the government action does not result in any physical invasion of the property, the action will still be considered a taking if the regulation deprives the owner of '*all* economically beneficial or productive use of [the] land.' [Citations.] '[T]he government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property.' [¶] Regulatory takings challenges outside these two categories, *i.e.*, those that do not involve a physical invasion or that leave the property owner with some economically beneficial use of the property, are governed by the 'essentially ad hoc, factual inquiries' set forth in *Penn Central Transp. Co. v New York City* (1978) 438 U.S 104, 124 . . . ." (*Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at pp. 260-261.)

A landowner claiming that application of government regulations effects a taking of a property interest cannot sue directly on an inverse condemnation cause of action unless state administrative and judicial remedies have been exhausted. (*Hensler, supra*, 8 Cal.4th at pp. 13-14.) *Hensler* explained: "If the alleged taking is a 'regulatory taking,' *i.e.*, one that results from the application of zoning laws or regulations which limit development of real property, . . . the owner must afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking. The owner

may do so, where appropriate, by a facial challenge to the ordinance, but in most cases must seek a variance if that relief is available and then exhaust other administrative and judicial remedies. The facial challenge may be through an action for declaratory relief [citation] The latter, an 'as applied' challenge to the development restrictions imposed by the administrative agency, may be properly made in a petition for writ of 'administrative' mandamus to review the final administrative decision (Code Civ. Proc., § 1094.5) and that action may be joined with one for inverse condemnation. A declaratory relief action also may be joined with an action in inverse condemnation. [Citation.] Damages for the 'taking' may be sought in an administrative mandamus action (Code Civ. Proc., § 1095), or, if the plaintiff seeks a jury trial, in the joined inverse condemnation action. [Citations.] The owner 'may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid' [Citation] Compensation must be paid for a permanent taking only if there has been a final judicial determination that application of the ordinance or regulation to the property is statutorily permissible and constitutes a compensable taking. Even then the state or local entity has the option of rescinding its action in order to avoid paying compensation for a permanent taking." (*Hensler*, 8 Cal.4th at pp 13-14.) A landowner who declines to follow these administrative remedies waives the right to sue for inverse condemnation. (*Id.* at p 19.)

III. Threshold Arguments

Speights makes several arguments preliminary to his takings contentions. First, invoking the so-called "civil law" rule of water law tort liability, which distinguishes between damage caused by natural surface water drainage and that resulting from "'watercourse'" water flowing from drains or other artificial means (*see Skoumbas v. City of Orinda*, *supra*, 165 Cal.App 4th at pp. 792-793),[3] Speights argues he was not required to accept the District's "'watercourse'" water on his property without City using eminent domain and paying him just compensation. For this proposition, he relies in part on *Inns v. San Juan Unified School District* (1963) 222 Cal.App 2d 174, in which the Court of Appeal upheld but modified an inverse condemnation judgment against a school district that had used a concrete drainage pipe to divert water from its property onto an adjacent property.[4] (*Id.* at pp. 176-180.)

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[3] The Court of Appeal in *Skoumbas v City of Orinda*, *supra*, 165 Cal.App 4th 783 recently explained "[A] landowner's tort liability for the diversion of surface water is decided under a rule of reasonableness . When a landowner diverts surface waters in an unnatural manner and damages a lower property, the upper landowner is liable in tort to the extent he or she failed to take reasonable care in the use of the upper property [Citation] This rule of liability is referred to as the modified 'civil law rule ' [Citations] Simply stated, the modified civil law rule provides that '1 If the upper owner is reasonable and the lower owner unreasonable, the upper owner wins, 2 If the upper owner is unreasonable and the lower owner reasonable, the lower owner wins, and 3 If both the upper and lower owner are reasonable, the lower owner wins also '" (*Id* at p 793)

[4] The *Inns* court modified the judgment to grant the school district in that case an easement to continue its use of the drain-

We fail to see *Inns*'s significance to the present case Speights's inverse condemnation cause of action was not brought against the District, on whose property the terminus of the storm drain at issue is undisputedly located. The District and City are separate and distinct public entities (*Department of Finance v. Commission on State Mandates* (2003) 30 Cal 4th 727, 752, fn. 20 [school districts are state agencies]; *Jackson v. Board of Ed. Of City of Los Angeles* (1967) 250 Cal.App.2d 856, 858) and there is no evidence City controlled the storm drain or otherwise accepted responsibility for the water diverted from the District's property.

Second, Speights asserts that the required storm water improvements were built solely on the District's property and served only the District, and contends there is no nexus between his property and the District's storm water drain system because the drain did not convey any of his storm water. Thus, he argues, under *Dolan*, *supra*, 512 U.S. 374 and *Nollan*, *supra*, 483 U.S. 825, he should not have been "singled out to disproportionately bear the burden of a public utility that should have been borne by the public in general" by the requirement that he construct a new storm water system for the District. *Nollan* and *Dolan* set out a heightened level of judicial scrutiny for particular governmental actions that are claimed to constitute a taking, including government demands that landowners dedicate an easement allowing public access on their property, or imposition of "special, discretionary permit conditions on development by individual property owners. . . ." (*See Lingle*, *supra*, 544 U.S. 528, 546, *San Remo*

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age system. (*Inns v. San Juan Unified School District*, *supra*, 222 Cal App 2d at p 180.)

Hotel L.P. v. City and County of San Francisco, *supra*, 27 Cal.4th at pp. 664-666; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 875-876, 881 (plur. opn. of Arabian, J.) [extending *Nollan/Dolan* heightened standard to ad hoc mitigation fees, characterized the fee as a special discretionary permit condition on development by individual property owners].) "The '*sine qua non*' for application of *Nollan/Dolan* scrutiny is thus the 'discretionary deployment of the police power' in 'the imposition of land-use conditions in individual cases'" (*San Remo Hotel*, at p. 670.) Speights's reliance on *Nollan/Dolan* suggests that his takings claim is premised on City's conduct in imposing the challenged drainage conditions. However, as we point out below, this is a theory Speights attempts to disclaim to avoid exhaustion requirements.

Third, Speights argues that City could not have required him to "accept" the District's water or supplement its drainage system as a condition of approval, because the District's pipe was not known to exist at the time City set out those conditions. He maintains that, similar to the building permit condition involved in *Salton Bay Marina, Inc. v. Imperial Irrigation District* (1985) 172 Cal.App.3d 914, 940-943, City's condition was not clear or readily apparent and thus he cannot be deemed to have accepted it and it should not be enforced. Again, this contention attacks City's imposition of the challenged drainage conditions, a claim that is barred if not first challenged by petition for writ of mandate. (*Salton Bay Marina*, at pp. 940-941, in part citing *Selby Realty Co v. City of San Buenaventura* (1973) 10 Cal.3d 110, 128.)

Fourth, Speights contends that because he paid "over $350,000 in impact fees and permits to build" and received "lawful" permits, he had a constitutional vested right that the City could not regulate away without paying him just compensation. He argues: "Once a property [right] is vested, the City loses its right to regulate zoning and land use or deny use of the property without paying just compensation, like they can do with vacant property." Speights distinguishes the case law City offered on grounds it involves parties still trying to obtain approvals or permits who do not hold (as he did) vested property rights

All of these arguments in our view lead to one theme: City's condition that Speights supplement the District's storm drain was unreasonable, unlawful and unenforceable, and City's refusal to grant Speights a final certificate of occupancy until he met that condition constitutes a taking for which City should compensate him for deprivation of the "use" of his property Yet, Speights seeks to avoid framing his inverse condemnation action as claiming that City imposed an "illegal condition" or land use regulation. He asserts (in both his opening and reply briefs) the "gravamen" of his case is that City "deprived Speights use [*sic*] of his vested rights to use his property." Based on this premise, Speights argues he suffered both physical and regulatory takings as well as compensable damage from City's assertedly "unreasonable and oppressive precondemnation conduct," for which he was not subject to an exhaustion of administrative remedies requirement or shortened statute of limitations for a petition for writ of mandate

We reiterate that on review of a summary judgment, our task is to examine Speights's inverse condemnation cause of action to determine: (1) the nature of the claim asserted; (2) whether City established facts that negate his claim; and, if so, (3) whether Speights's opposition demonstrates the existence of a material factual issue for a trier of fact (Code Civ. Proc., § 437c, subds. (c) & (p).) We are to identify, not resolve, issues of fact and credibility. (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1345; *Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70, 76.)

IV. Vested Rights Doctrine

Under the judicial vested rights doctrine, a property owner acquires a vested right to complete a construction project in conformity with a building permit once it has performed substantial work and incurred substantial liabilities in good faith reliance upon a building permit. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791 (*Avco*); *see Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 646; *Blue Chip Properties v. Permanent Rent Control Board of the City of Santa Monica* (1985) 170 Cal.App.3d 648, 659.) "'Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he [or she] relied.' [Citation.] . . . [N]either the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued.' [Citation.] '[T]he rights which may "vest" through reliance on a government

permit are no greater than those specifically granted by the permit itself.'" (*Davidson*, at p. 646, quoting *Avco*, 17 Cal.3d at pp. 791, 793 & *Santa Monica Pines, Ltd v. Rent Control Board* (1984) 35 Cal.3d 858, 866, disapproved on other grounds in *City of West Hollywood v. Beverly Towers, Inc* (1991) 52 Cal.3d 1184, 1191-1192.) A leading treatise explains: "The vested rights rule requires that the government agency exercise its final discretion to issue a grant of authority or permit which specifically describes a particular approval or work of improvement. Thereafter, if the developer begins to perform the work described in the grant or permit, he or she may acquire a vested right to complete the specific and particular work that is described The grant or permit does not give any rights to complete any work not specifically described" (9 Miller & Starr, Cal. Real Estate (3d ed 2001) § 25:70, pp. 324-325, 327-328)

Under this doctrine, the property owner may not be subjected to subsequently adopted regulations prohibiting or restricting the project. (*See Hafen v. County of Orange* (2005) 128 Cal.App.4th 133, 142-143; *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1270-1271; *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 552; *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 321-322.) "'The vested rights doctrine is "'predicated upon estoppel of the governing body'" [Citation] This is a principle of equitable estoppel which may be applied against the government where justice and fairness require it.'" (*Hermosa Beach,* at p. 551) A developer can face "daunting odds" in establishing estoppel in a land use case due to the severe limitations imposed by courts balancing private interests with public policies to

uphold legally established requirements for obtaining permits. (*Toigo v. Town of Ross*, at p. 321.) "[E]stoppel can be invoked in the land use context in only 'the most extraordinary case where the injustice is great and the precedent set by the estoppel is narrow'" (*Ibid., quoting Smith v. County of Santa Barbara* (1992) 7 Cal.App.4th 770, 775.)

On appeal, Speights does not describe the nature and extent of his claimed vested right, nor does he clearly identify the permit under which he assertedly obtained a vested right to build. In the trial court, he argued he had a vested right to complete his project "in accordance with [the] approved permits." There is no dispute that in May 2001 Speights obtained City's approval of his original development plan for apartment buildings and performed substantial work on his project in reliance on that plan. Nor is there any dispute that on April 10, 2002, about twenty days before Speights discovered the District's subsurface pipe, City approved his precise grading and drainage plan The relevant question is whether this evidence shows Speights obtained a vested right to complete his project in conformity with the 2001 development plan or the drainage plan that City approved in April 2002, so as to equitably estop City from imposing any new or different drainage requirements. Because City's actions are not in dispute and the question requires an analysis of Speights's development plans and permits, the question is one of law. (*E.g , Toigo v. Town of Ross, supra*, 70 Cal.App.4th at p. 320 [determination of estoppel under claim of vested rights is one of law where facts are undisputed and only one reasonable inference may be drawn]; *Aries Dev. Co. v. California Coastal Zone Conservation Com.* (1975) 48 Cal App.3d 534, 545 [same].)

We conclude as a matter of law on the undisputed facts in this record that Speights has not established a vested right to complete his project without complying with City's storm drain requirements. He relies on *Pardee Construction Co. v. California Coastal Commission* (1979) 95 Cal.App.3d 471, which we find inapposite,[5] and *Avco, supra*, 17 Cal.3d 785. *Avco* requires that our focus be on whether Speights obtained permits providing definitive governmental approval for the improvements of which he complains, only construction and expenditures undertaken by Speights in reliance on that permit are considered in assessing whether a vested right has arisen (*See Avco*, at p. 793; *Highland Development Company v. City of Los Angeles* (1985) 170 Cal.App.3d 169, 186-187 [in developer's claim that a city improperly blocked him from his vested right to use a driveway only the driveway permit was relevant; the large sums of money expended to outfit the garage served

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[5] We see no relevance of *Pardee Construction Co v California Coastal Com , supra*, 95 Cal App 3d 471 other than for general propositions relating to the vested rights doctrine *Pardee* involved a statute within the 1972 Coastal Act exempting any person with vested development rights from having to secure certain additional permits, "'providing that no substantial changes'" were made to the pre-approved development (*Id* at p 474) Pardee had obtained an exemption under that statute and constructed 152 units, but elected to delay building 79 remaining units, after which he was refused another exemption when he sought a new building permit (*Id* at pp 475-476) On review of Pardee's writ of mandate, this court held the California Coastal Commission could not, through its general authority to promulgate regulations, exceed the powers expressly granted by the statute and add additional permitting conditions on the maintenance of vested development rights (*Id* at pp. 477-478.) This case does not involve a statutory exemption, so *Pardee* is factually inapposite

by the driveway were not to be considered in the "'reliance' scale when assessing the vested rights claim], disapproved on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 744, fn. 11.)

If Speights claims a vested right stemming from City's May 2001 permit, the claim fails for that permit's lack of details of a specific work of improvement relating to drainage. (*E.g. Avco, supra*, 17 Cal.3d at p. 794; *Court House Plaza Co v. City of Palo Alto* (1981) 117 Cal.App.3d 871, 885; *Billings v. California Coastal Com.* (1980) 103 Cal.App.3d 729, 735 [vested right might arise from preliminary permit approving a specific project and contain all final discretionary approvals required for completion of the project]; *Patterson v. Central Coast Regional Com.* (1976) 58 Cal.App.3d 833, 842-843) The May 2001 development plan provided its drainage design was "conceptual only" and that the final design was to be based on a study to be approved by the city engineer during final engineering. Under *Highland Development Company v. City of Los Angeles, supra*, 170 Cal.App.3d at pages 186-187 and the other authorities cited above, Speights's payments toward construction of apartment buildings and improvements unrelated to drainage do not factor into the reliance equation.

If Speights asserts a vested right stemming from City's April 10, 2002 permit approving his precise grading and drainage plan, the claim fails because Speights cannot present evidence he "performed substantial work and incurred substantial liabilities in good faith reliance on [that] permit" before he discovered the District's storm drain and City advised him he would be required to address that new issue

to its engineer's satisfaction. (*Avco*, 17 Cal.3d at p. 791; *Santa Monica Pines, Ltd. v Rend Control Board, supra*, 35 Cal.3d 858, 867 [vested rights claim rejected where appellants only expended $1,709 between approval of the tentative subdivision map and adoption of the rent control law at issue]; *Toigo v. Town of Ross, supra*, 70 Cal App.4th at p. 321; *Aries Dev. Co. v. California Coastal Zone Conservation Com., supra*, 48 Cal.App.3d at pp. 549-550.) Because acquisition of a vested right is grounded in estoppel, a developer must show he materially changed his position in reliance on a government representation that his construction was fully approved and legal. (*Aries Dev. Co.*, at pp. 548-549 [developer sought exemption from Coastal Act coastal permit requirements; Court of Appeal held its work performed before date of Coastal Act approval was not done in a good faith belief he had received all final discretionary approvals, noting developer "entertained substantial doubts about his legal position" and speeded up timetable in effort to escape pending land-use controls].) Here, shortly after discovery of the District's drain pipe, City notified Speights he would be required to address the problem of waterflow from the drain onto his property. It is undisputed that after Speights unsuccessfully sought City's approval for his drainage proposals, he proceeded to connect the District's storm drain to his drainage system on the property without City's approval. The uncontradicted facts do not permit an inference that Speights reasonably relied on City's April 2002 permit as City's representation that his construction was fully approved and legal without addressing drainage from District's storm drain. "Good faith reliance on a governmental permit is essential to the acquisition of a vested right " (*Id* at p. 548.)

More fundamentally, even to the extent it is based on a vested rights theory, Speights's inverse condemnation action fails because in effect he seeks to invalidate City's drainage requirements imposed as conditions of the 2005 grant of the conditional use permit and revision to his development plan. The exclusive remedy for judicial review of such a claim is administrative mandamus under Code of Civil Procedure section 1094.5. (*City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718; *see also Rezai v City of Tustin* (1994) 26 Cal.App.4th 443, 448-449; *Saad v. City of Berkeley* (1994) 24 Cal App 4th 1206, 1211, *Pfeiffer v City of La Mesa* (1977) 69 Cal.App.3d 74, 78.) "'A land[]owner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits afforded by the permit'" (*City of Santee*, at p. 718.) Failure to contest the validity of conditions by means provided for judicial review through administrative mandamus estops Speights from relitigating the same issue "regardless whether the context be declaratory relief or inverse condemnation." (*Id.* at p. 719.) Absent a timely petition for administrative mandamus to invalidate the drainage conditions imposed by City, Speights cannot litigate the validity of these conditions under any theory, including one framed as an assertion of "vested rights."[6] (*Ibid.*)

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[6] The exhaustion requirement in this context is evidenced by the numerous cases in which the plaintiffs' claims of "vested rights" are brought by petition for writ of mandamus. (*See Davidson v Count of San Diego*, *supra*, 49 Cal App 4th at p 645 [trial court issued peremptory writ of mandate], *Consaul v City of San Diego* (1992) 6 Cal.App.4th 1781, 1791-1792 [plaintiff sought relief in ordinary mandamus under section 1085, Court

We note that cases recognize an exception to the general rule requiring exhaustion of administrative remedies in limited circumstances where a project requires phased permits depending on its progression and "'. . . the time necessary to challenge the legality of [a fee condition imposed on a subsequent permit] by petition for mandamus is economically impractical . . . '" (*Rezai v. City of Tustin, supra*, 26 Cal.App 4th at p. 450, *citing McLain Western #1 v County of San Diego* (1983) 146 Cal.App.3d 772, 777; *see also Laguna Village, Inc. v County of Orange* (1985) 166 Cal App.3d 125, 128.) Speights does not rely on these cases on appeal. In fact, Speights argues in his reply brief that *McLain* is inapposite because it does not involve a property owner's vested right. Even if we were to address the exception, we would conclude for the reasons expressed in *Rezai* that it does not apply. Here, Speights does not seek refund of a *fee condition*

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of Appeal construed petition as raising issues sounding in both ordinary mandamus and administrative mandamus under section 1094.5, subdivision (b)]; *Blue Chip Properties v Permanent Rent Control Board of the City of Santa Monica, supra*, 170 Cal App 3d at p 654 [petitions for writ of mandate filed by developer and owners seeking to convert apartments to condominiums and claiming vested right to convert without a rental housing removal permit], *Highland Development Co v City of Los Angeles, supra*, 170 Cal.App.3d 169; *McCarthy v California Tahoe Regional Planning Agency* (1982) 129 Cal App 3d 222, 224, 228-229 [challenge to assertion of jurisdiction by California Tahoe Regional Planning Agency to compel encroachment permit allowing highway access to property], *Anderson v City of La Mesa* (1981) 118 Cal App 3d 657, 659 [petition for peremptory writ of mandate challenged City's imposition of different set back requirement contrary to a previously issued building permit]; *Aries Dev Company v California Coastal Zone Conservation Com., supra*, 48 Cal App 3d at p 537 [petition for writ of mandate filed by developer to set aside Coastal Commissions denial of an exemption from permit requirements])

as had the plaintiffs in both *McLain* and *Laguna Village*. Under similar facts, the *Rezai* court reasoned the exception should not be applied "where the landowner does not seek the refund of a fee, but seeks damages arising from conditions restricting the development or requiring additional amenities In the former circumstance, the amount in controversy is fixed and does not vary based upon any decision by the administrative body or construction of the project. But in the latter, the claimed damages are uncertain and become irrevocable when the project is built. Liability for such damages, if the project is built without a decision by way of administrative mandamus and the city has erred, would have the same chilling effect on planning decisions eschewed by the courts in *Agins v City of Tiburon* [(1979)] 24 Cal.3d 266[, overruled on other grounds in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* (1987) 482 U.S. 304, 319] and *Air Quality Products, Inc. v. State of California*[(1979)] 96 Cal.App.3d 340 . . ." (*Rezai*, at p. 451.)

V. Physical Taking Argument

Speights contends he suffered a physical taking as a result of City's conduct. As we understand it, Speights seems to argue that City prohibited him from "physically using" his property, in part on evidence that a City staff member told Speights he would hold his property "'hostage.'" He also analogizes his facts to those in which the United States Court of Federal Claims found a physical taking of vested water rights in *Estate of Hage* (2008) 82 Fed.Cl. 202. Speights argues there is "little difference" between preventing access to a stream of water and preventing access to "streams of renters and condo buyers." We reject these arguments.

As a threshold matter, Speights disclaimed any "physical taking" theory in the trial court by failing to brief that theory in any meaningful way, and he may not raise it for the first time here (*DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676; *Sangster v. Paetkau, supra*, 68 Cal.App.4th at p. 163; *American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281.) No such theory was presented by counsel's mere assertion at the final summary judgment hearing that Speights was "not saying it is only a regulatory taking analysis" and his statement that he believed there were "other theories" that would support the inverse condemnation claim. Additionally, Speights cites only to argument in his memorandum of points and authorities as support for his assertion about the City representative's "hostage" statement. As we have stated (*see* footnote 1, *ante*), a plaintiff does not raise a triable issue of material fact by citing to mere argument. (*Roberts v. Assurance Co. of America*, *supra*, 163 Cal.App.4th at p. 1404, *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 10-11.)

Even if we were to consider the merits of Speights's arguments, we are unconvinced by his analogy to *Estate of Hage, supra*, 82 Fed.Cl. 202 We are not bound by lower federal court decisions. (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1274, *citing People v. Gray* (2005) 37 Cal.4th 168, 226.) *Hage* is inapposite because it involved the government's active construction of fences on federal grazing land around streams in which the plaintiffs had established a vested water right, preventing the plaintiffs' cattle from accessing water under threat of trespass. (*Hage*, at p. 211.) The court of federal claims stated those actions "[c]learly . . . prevented

Plaintiffs' access to the water and there was plainly a 'physical ouster' which deprived Plaintiffs of the use of their property." (*Ibid.*) Here, City did not fence Speights's property, otherwise physically block Speights from accessing his property, or impose an easement requirement.

Nor does Speights persuade us with his reliance on *Uniwill L.P. v. City of Los Angeles* (2004) 124 Cal.App 4th 537. In his reply brief, Speights argues that as in *Uniwill*, the gravamen of his cause of action is City's appropriation of an "absolute property right" that is not subject to a 90-day statute of limitations for a writ of mandate. The contention is without merit. *Uniwill* involved a city's demurrer to a complaint in which the plaintiff developer, Uniwill, alleged that the city had demanded it grant an easement to a privately owned public utility after the city had approved a tentative tract map and the plaintiff had completed substantial work on the project. (*Id.* at pp. 543-544.) Uniwill had alleged the city's easement requirement was not part of the permit approval process, but "simply coerced in an informal but highly effective manner after Uniwill had obtained all of the permits necessary to complete its project." (*Id.* at p. 542.) The trial court sustained the City's demurrer on grounds Uniwill had not timely challenged the easement condition within 90 days after it learned of the city's demand that Uniwill grant the easement. (*Id* at p. 542.)

The Court of Appeal reversed. (*Uniwill L.P v. City of Los Angeles, supra*, 124 Cal.App.4th at pp. 543-544.) It reasoned Uniwill's complaint showed that the easement requirement was not a permit condition, but merely a "threat" to deprive Uniwill of a final tract map and certificate of occupancy on

completion of the project in conformity with the previously issued government approvals. (*Id.* at pp. 543-544.) Thus, the applicable limitations period was the five-year statute of limitations applicable to an inverse condemnation action based on a physical taking (*id.* at p. 541, *citing Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 775), and the complaint's allegations showed the action was filed within five years after the alleged taking. (*Uniwill*, at pp. 541, 544.) Further, the Court of Appeal reversed judgment on the pleadings in the private utilities' favor, holding Uniwill's complaint contained allegations that may state a cause of action for "recission and restitution for economic distress," and leave to amend could have cured Uniwill's pleading defects. (*Id.* at p 545.)

Speights's action is unlike Uniwill's. He has not been subjected to an easement requirement, which would give rise to an action for inverse condemnation based on a physical taking governed by a five-year statute of limitations and not subject to exhaustion requirements. (*Travis v. County of Santa Cruz, supra*, 33 Cal.4th at p. 775; *Hensler, supra*, 8 Cal.4th at p. 13.) The five-year limitation period does not apply to a regulatory taking based on enactment of a zoning ordinance, or any other taking claim based on demands made by a governmental agency as conditions of permit approvals. (*Travis,* 33 Cal.4th at p. 775.) City's imposition of a requirement that Speights increase the size of an existing drain and otherwise construct a drainage system on the District property can in no way be characterized as a per se physical taking of his own property. (*Allegretti v. County of Imperial, supra*, 138 Cal.App.4th at pp. 1272-1273.)

VI. Regulatory Taking Argument

To the extent Speights is basing his inverse condemnation cause of action on a theory of a regulatory taking, it is barred by his undisputed failure to challenge the City's drainage condition imposed by the 2005 conditional use permit by timely petition for writ of mandamus. (*Hensler*, *supra*, 8 Cal.4th at pp. 14-15, 19; *Mola Development Corp v. Seal Beach* (1997) 57 Cal.App.4th 405, 410-411; *Rezai v. City of Tustin*, *supra*, 26 Cal.App.4th at pp. 448-450; *Pfeiffer v. City of La Mesa*, *supra*, 69 Cal App.3d 74)

We are cognizant that in framing his regulatory taking challenge, Speights argues it is not a "typical" taking case involving a written law, ordinance, article or code. He describes the "character of the governmental action" as conduct by City representatives to exact a public utility from him without any basis in the original conditions of approval, and hold his property "hostage" until he was "financially suffocated," akin to *Uniwill*, *supra*, 124 Cal.App.4th 537. Yet, he proceeds to undertake an analysis under *Penn Central Transp Co. v. New York City*, *supra*, 438 U.S. 104, discussing the extent to which the "regulation" has interfered with distinct investment-backed expectations, and the economic impact of the regulation on him. Because the gravamen of Speights's regulatory taking claim is an attack on City's imposition of the drainage conditions (and unreasonable denial of a certificate of occupancy based on that assertedly invalid condition), we conclude exhaustion requirements are applicable, thus defeating his cause of action on this theory as a matter of law.

VII. *Klopping* Claim

Speights contends City engaged in unreasonable "precondemnation conduct" of the sort addressed in *Klopping*, *supra*, 8 Cal.3d 39 and *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694 (not followed on damages issues by *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 809, fn. 6) in its desire to devalue and obtain his property for low income housing. He describes City's conduct as its: refusal to issue certificates of occupancy or allow him to bond the District's public work project to obtain the certificates of occupancy, threats to buy his loan note and withhold approval unless he sold the property to City, dealing with his lender to purchase his property, interference with his renting his complex at market rates or selling his property and its highest and best use by refusing to issue certificates of occupancy, refusal to allow his change in development plan, and "continual sand bagging and foot dragging."

"In *Klopping*, the Supreme Court held that the 'just compensation' requirement is also triggered where, prior to a taking, 'the condemner acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct.' [Citation] In such circumstances, *Klopping* held, the Constitution also requires that 'the owner be compensated,' and announced the following rule: in an eminent domain action, 'a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution

in market value.'" (*Redevelopment Agency of City of San Diego v. Mesdaq* (2007) 154 Cal App.4th 1111, 1134 (*Mesdaq*), quoting *Klopping, supra*, 8 Cal.3d at pp 51-52, 53.)

In the trial court, City's initial response to Speights's *Klopping* argument was that such damages did not apply because no eminent domain action was threatened or pending with respect to Speights's property. In supplemental briefing, however, City raised Speights's abandonment of the *Klopping* theory and failure to exhaust administrative remedies. City repeats its initial argument on appeal, relying on *Mesdaq, supra*, 154 Cal.App.4th 1111, and *Melamed v. City of Long Beach, supra*, 15 Cal.App.4th 70. It points out City never exercised or attempted to exercise its eminent domain authority defeating Speights's *Klopping* claim.

Mesdaq involved an agency's eminent domain action filed after it had adopted a "resolution of necessity" seeking to acquire a landowner's property. (*Mesdaq, supra*, 154 Cal.App.4th at p. 1119) In a court trial on the landowner's *Klopping* claim, the landowner argued the agency unreasonably issued a 60-day Polcano Act notice requesting remedial clean-up of hazardous substances on his property (Health & Saf. Code, § 33459.1, subd. (b)(2)) as a "negotiation tool," creating liability for precondemnation damages. (*Mesdaq, supra*, 154 Cal.App 4th at pp 1119, 1134-1135.) Though the trial court allowed such a claim, on appeal this court disagreed and reversed. We noted the absence of case law holding that issuance of that notice or other analogous regulatory activity could constitute a compensable "precondemnation statement," *i.e.*, a public announcement of an intent to acquire the plaintiff's land, under *Klopping*. (*Mes-*

daq, at p. 1136.) However, though this court emphasized the narrow scope of precondemnation remedies available under *Klopping* (*Mesdaq*, 154 Cal.App 4th at pp. 1135-1136), we did not resolve the ultimate question as to whether the notice constituted a compensable precondemnation statement, because we held issuance of the notice did not result in legally cognizable damages measured in terms of diminished market value. (*Id* at p. 1137.) *Mesdaq* does not hold that a public entity's purchase offer to a private landowner is insufficient to make out a precondemnation damages claim, nor does it squarely address the circumstances presented here, where City unambiguously expressed its interest in purchasing Speights's property and made a purchase offer to Speights, but did not initiate an eminent domain action

Nor does *Melamed v City of Long Beach, supra*, 15 Cal.App.4th 70 involve that issue. *Melamed* addressed application of Government Code section 7267.2 to a City's purchase of certain property; that statute requires a city to offer just compensation in an amount no less than the approved appraised value of property before exercising its power of eminent domain (*Melamed*, 15 Cal.App.4th at p. 73.) The Court of Appeal held it did not apply in every acquisition of real property; that the Legislature limited the requirement to circumstances where the public entity is planning to initiate eminent domain proceedings through a resolution of necessity. (*Id.* at pp. 78-80.) Neither of these cases convinces us as a matter of law that City's mere purchase offer to Speights for his property cannot give rise to an inverse condemnation cause of action under a *Klopping* theory.

Nevertheless, absent a challenge by petition for writ of mandate, we conclude Speights is not entitled to seek *Klopping* precondemnation damages as a matter of law. As we have stated, the gravamen of Speights's claim is that City unreasonably denied him a certificate of occupancy for his project by imposing invalid drainage conditions for the purpose of compelling a lower purchase price for the property. The situation is akin to that in *Selby Realty Co. v City of San Buenaventura, supra*, 10 Cal.3d 110, in which the city refused a building permit for apartment construction unless the plaintiff dedicated and improved a street pursuant to a general plan designation. (*Id.* at p. 116) The plaintiff in *Selby Realty Co.* filed an action against a county and individual county and city representatives in part asserting damages in inverse condemnation. (*Id.* at pp. 119, 127.) As against the city, the plaintiff brought causes of action alleging a "scheme" to take its land without compensation, and "in furtherance of that 'scheme' the city denied plaintiff a permit . . . for the purpose of 'extorting' plaintiff's land." (*Id.* at pp 127-128.)

The California Supreme Court held the plaintiff stated no inverse condemnation cause of action based on this conduct: "The gravamen of plaintiff's complaint is that the city refused to issue the permit unless plaintiff complied with an assertedly invalid condition. The appropriate method by which to consider such a claim is by a proceeding in mandamus under section 1094.5 of the Code of Civil Procedure." (*Selby Realty Co., supra*, 10 Cal.3d at p. 128; *see also Redevelopment Agency v. Contra Costa Theatre, Inc* (1982) 135 Cal.App.3d 73, 80-82 [plaintiff failed to establish entitlement to precondemnation damages under *Klopping* because compelling public policy considerations dictate use of administrative manda-

mus as the sole remedy where the challenged improper conduct consists solely of zoning or use permit denial]; *Frisco Land & Mining Co. v. State of California* (1977) 74 Cal.App.3d 736, 757 [citing *Selby* and holding that *Klopping* was not pertinent because "the state has never taken any action to condemn the subdivider's property"].) Having failed to proceed by writ of mandate on his action attacking City's denial of his certificate of occupancy and imposition of assertedly invalid drainage conditions, Speights cannot establish entitlement to *Klopping* precondemnation damages.

VIII. Due Process Argument

Speights argues City deprived him of due process of law by (1) preventing his appeal of the planning director's decision to reject his change in plans to construct condominiums and (2) failing to timely provide him with copies of the new conditions of approval including new drainage requirements before it issued them in November 2005. As support for these propositions, he relies solely on the Fourteenth Amendment to the United States Constitution and the federal civil rights statute (42 U.S.C. § 1983).

Speights's due process argument—which was asserted in the trial court below in supplemental briefing—does not defeat summary judgment. The sole cause of action in Speights's first amended complaint is for inverse condemnation and, under settled summary judgment standards, the reviewing court is limited to assessing those theories alleged in the plaintiff's pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332; *Oakland Raiders v. National Football League* (2005) 131 Cal App 4th 621, 648, *Laabs. v. City of*

Victorville (2008) 163 Cal.App.4th 1242, 1253-1258 & fn. 7) "'The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings.'" (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) "A summary judgment . . . motion that is otherwise sufficient 'cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings. . . .' Thus, a plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing." (*Oakland Raiders*, at p. 648; *see also County of Santa Clara*, at p. 333, *Laabs. v City of Victorville*, at p 1257.)

Speights does not allege a cause of action for violation of his federal civil rights, which would rest on an entirely "different theor[y] of recovery" (*Laabs v. City of Victorville, supra,* 163 Cal.App.4th at p. 1257; *see, e.g., Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal App.4th 687, 702, 709, fn. 13 [landowner alleged separate causes of action for inverse condemnation and violation of federal civil rights]) and is not fairly encompassed in his complaint. As a consequence, his due process arguments do not raise triable issues of material fact for a jury on his inverse condemnation cause of action.

DISPOSITION

The judgment is affirmed

O'ROURKE, J.

WE CONCUR·

McDONALD, Acting P. J.

IRION, J.